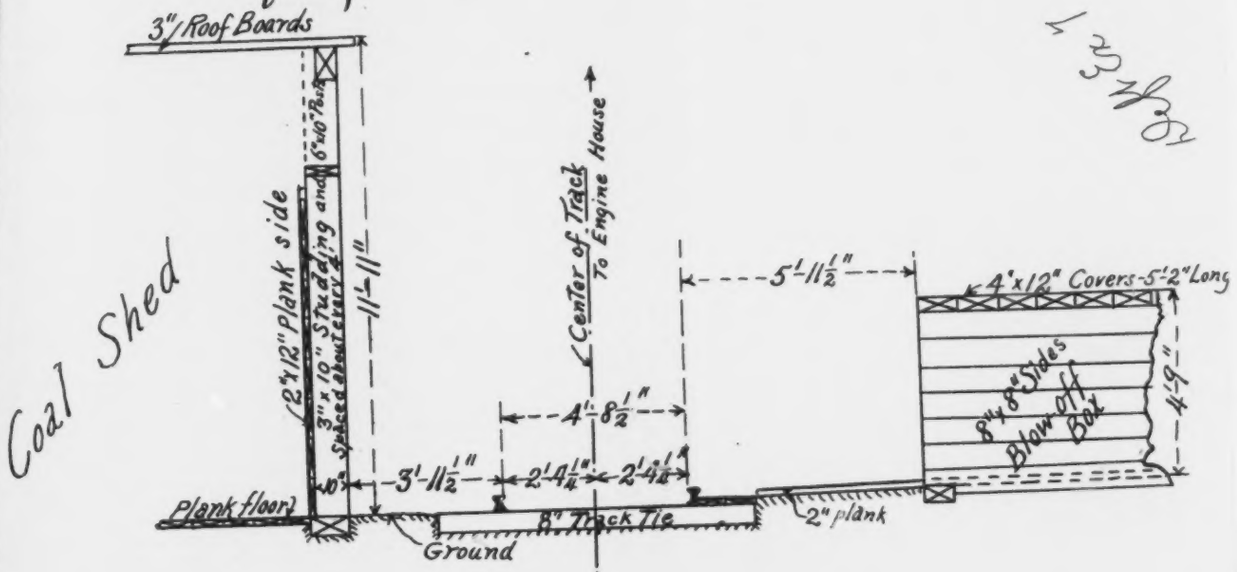
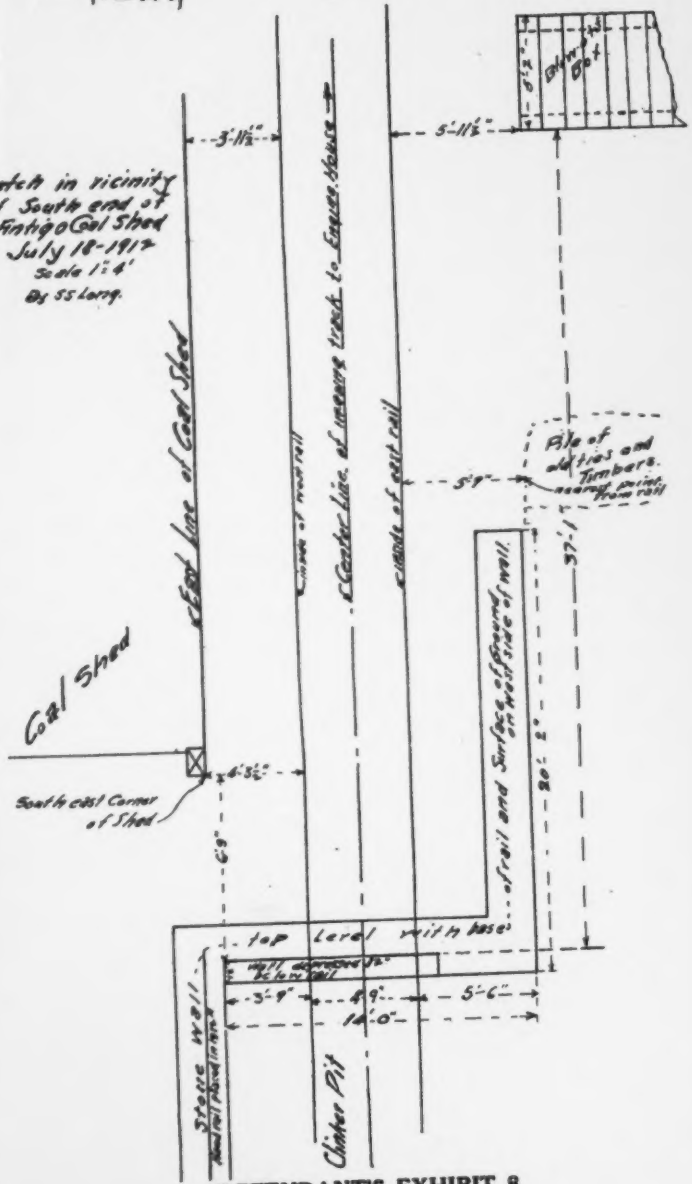
No. 232
C. & N. Ry Co. } P. 379
to
Gray



Cross-Section of in-going track to
Antigo Engine House
Taken on line with south side
of Blow-off Box
July-18-1912.
Scale = 1" = 4'
By S S Long.

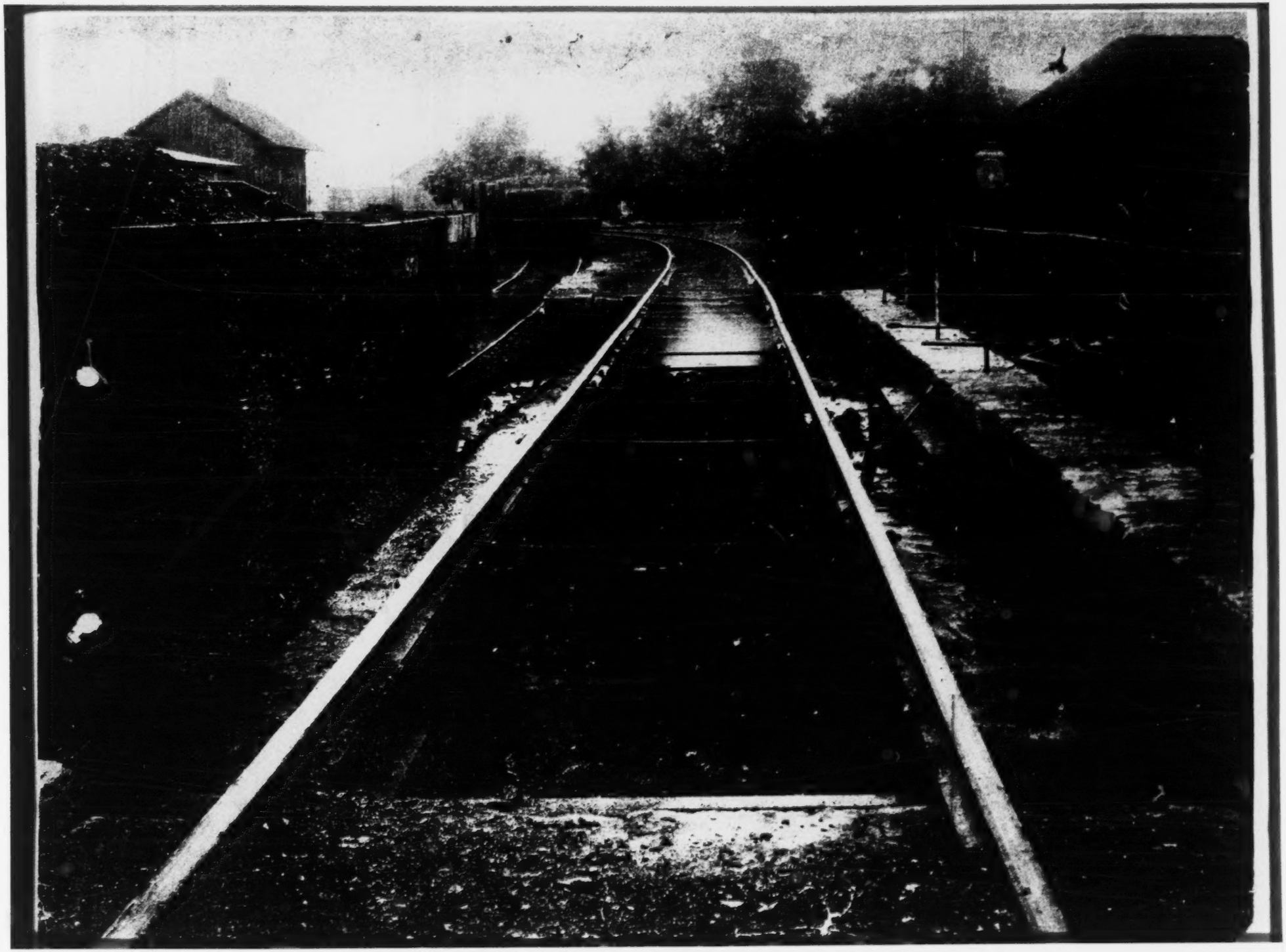
C. & N. Ry Co. } No. 232 } p. 380

dpm



DEFENDANT'S EXHIBIT 8

380



382 STATE OF WISCONSIN,
Outagamie County:

Municipal Court, Circuit Court Branch.

WILLIAM H. GRAY, Plaintiff,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

I, A. O. Danielson, Clerk of Municipal Court for Outagamie County, in the State of Wisconsin, do hereby Certify that the foregoing and annexed paper writings, towit:

1. Plaintiff's Exhibit A, Notice to produce papers.
2. Plaintiff's Exhibit B, Report of Wm. H. Kane, engineer.
3. Plaintiff's Exhibit C, Letter of Wm. Rock, dated Dec. 5, 1911.
4. Defendant's Exhibit 1, Blue print showing location of track and buildings.
5. Defendant's Exhibit 2, Photograph showing cinder pit.
6. Defendant's Exhibit 3, Photograph showing coal shed.
7. Defendant's Exhibit 4, Photograph showing path and roadway along west side of the coal shed.
8. Defendant's Exhibit 5, Plaintiff's report of personal injury.
9. Defendant's Exhibit 6, Blue print, which is an extension of defendant's exhibit 1, of tracks and grounds north of roundhouse.
10. Defendant's Exhibit 7, Sketch in pencil showing cross-section of ingoing track to engine house, Antigo.
11. Defendant's Exhibit 8, Sketch in pencil showing south end of coal shed and vicinity, Antigo.
12. Defendant's Exhibit 9, Photograph taken near north end of cinder pit.

introduced by the plaintiff and defendant, are all the exhibits offered on the trial of the above entitled action, and received in evidence; that the same are separately certified as a part of the Bill of Exceptions pursuant to a stipulation therefor, which stipu-
383 lation is also annexed hereto, and the same are transmitted to the Supreme Court of the State of Wisconsin pursuant to the notice of appeal in said action.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, this 12th day of March, 1913.

[SEAL.] A. O. DANIELSON,
Clerk of Municipal Court, Outagamie County, Wisconsin.

384 And afterwards on the 30th day of April, A. D. 1913, the same being the twenty-ninth day of said term, the following proceedings were had in said cause in this court:

Outagamie Municipal Court.

WILLIAM H. GRAY, Respondent,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by C. H. Gorman, Esq., for the said appellant, and by Messrs. S. J. McMahon and P. H. Martin for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein took time to consider of its opinion.

385 And afterwards, to-wit: on the 31st day of May, A. D. 1913, the same being the thirty-fifth day of said term, the judgment of this court was rendered in words and figures following, that is to say:

Outagamie Municipal Court.

WILLIAM H. GRAY, Respondent,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

Opinion by Chief Justice Winslow.

This cause came on to be heard on appeal from the judgment of the Municipal Court of Outagamie County and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this court, that the judgment of the Municipal Court of Outagamie County, in this cause, be, and the same is hereby affirmed with costs against the said appellant taxed at the sum of Eighty-seven and 50/100 Dollars ($87.50).

386 Thereupon the opinion of the Court by Chief Justice Winslow was filed in words and figures following, that is to say:

387 In Supreme Court, State of Wisconsin.

January Term, 1913. No. 122.

WILLIAM H. GRAY, Respondent,
vs.
CHICAGO & NORTHWESTERN RY. CO., Appellant.

Personal injuries. Plaintiff, a man fifty-one years of age, was for years an employee of the defendant, and in January, 1911, was an "engine dispatcher" or "hostler" in the defendant's yards at Antigo, Wisconsin. His duties were to take charge of every engine coming into the yards at the close of its run, empty the fire box by dumping the coal and cinders into the cinder pit, run it to the coal house to be replenished with coal, to the water tank to be replenished with

water; thence to the wood bin to be supplied with kindling to start a fire, and thence to the roundhouse to wait for its next trip. He had an assistant named Rock, and a helper named Kraioski; the latter was called the pitman, and it was his duty to clean out the pan of the engine, wet down the coals and cinders, and shovel the cinders out of the pit. The tracks in the yards run practically north and south, the roundhouse being at the north end and the engines coming in at the south end. As the engine comes in to the yard it first reaches the cinder pit, a long rectangular pit, several feet deep, which is about eighty feet in length, somewhat wider than the track and immediately under the same; six feet nine inches north of this pit and on the west side of the track is a coal shed, which parallels the track for about two hundred and fifty feet northward, and is four feet three inches distant from the west rail thereof, leaving a clearance space of about eighteen inches; on the east side of the
388 track, about twelve feet distant from the east rail and about sixty feet north of the cinder pit is a small shelter shanty, nine by fifteen feet in size, in which the plaintiff and his helpers stayed when not required by their duties to be actively at work; the sandhouse, water tank and wood bin were still further north on the east side of the track, and the roundhouse was two hundred feet further north than the woodbin. About thirty engines were dispatched during the twenty-four hours, of which the plaintiff and his assistant dispatched about half; their working hours were from six o'clock A. M. until six o'clock P. M. The accident in question happened between ten and eleven o'clock in the forenoon of January 19, 1911. The plaintiff testified that on that morning he and his helper had dispatched four engines prior to 8:20 o'clock, at which time he went to the depot to get his pay check; he then went to a grocery store and also to a saloon near by, and returned to the roundhouse after an absence of about fifty minutes; he remained at or in the vicinity of the roundhouse about three quarters of an hour and then walked southward on the east side of the track past the sandhouse and the shanty to a point about twenty-three feet south of the shanty, where he crossed to the west side of the track and walked along south along the east side of the coal shed, between it and the west rail of the track to the southeast corner of the coal shed, and continued south to a point three or four feet south of the north line of the cinder pit, where he stopped. He testifies that he came to this point because when he left the roundhouse he saw so much steam and smoke arising from the cinder pit that he concluded that he ought to ascertain whether the cinder pit man, Kraioski, was performing his duty in putting out the fire in the cinder pit; he further testifies that when he reached the last point above stated he saw Craioski stand-
389 ing at the west edge of the cinder pit with the hose in his hands, throwing water on the hot cinders in the pit, and that when he saw this he started back to the shanty along a beaten path between the coal shed and the west rail; that smoke and steam were coming from the cinder pit in volumes and were blown northward so as to obscure the vision; that as he reached a point about opposite the shanty, as he thought, he turned eastward, stopped and listened a

few seconds, but heard nothing, as he thought, except the sizzling of the water on the cinders and hot coals in the cinder pit, and then started to step over the west rail of the track, and was struck by engine No 1066 and badly injured; he claimed that the engine was drifting or approaching noiselessly without working steam and without ringing the bell. The fact that he was struck by the engine is admitted. The negligence claimed was (1) the failure to stop the engine south of the cinder pit, in violation of a regulation or order claimed to exist to that effect. (2) the failure to ring the engine bell, and (3) the running of the engine at a negligent rate of speed under the circumstances.

The jury returned the following special verdict:

1. Was the plaintiff, on the 19th day of January, 1911, struck by one of defendant's engines and injured? Answer: Yes. (By the Court.) 2. Did the defendant, prior to the day of the plaintiff's injury cause an order to be issued providing in substance that engines delivered on coal shed track to be dispatched, should stop south of the cinder pit? Answer: Yes. 3. If you answer question number two 'yes,' was such order abrogated prior to the day of the plaintiff's injury? Answer: No. 4. If you answer question number two 'yes' and question numbered three 'no' then was Engineer Kane guilty of negligence in running his engine north of the cinder pit in violation of such order at the time plaintiff was injured? Answer: Yes. 5. If you answer question numbered four 'yes' then was such negligence of Engineer Kane a proximate cause of plaintiff's injury? Answer: Yes. 6. Was the engine bell of the engine that struck plaintiff ringing at and immediately prior to the time of plaintiff's injury? Answer: No. 7. If you answer question numbered six 'no' then was
Engineer Kane guilty of negligence in failing to cause the
390 engine bell to be rung immediately prior to the time of plaintiff's injury? Answer: Yes. 8. If you answer question numbered seven 'yes' then was such negligence a proximate cause of plaintiff's injury? Answer: Yes. 9. Under the circumstances existing, was Engineer Kane guilty of negligence in running the said engine north of said cinder pit to the place where it struck plaintiff at the rate of speed at which he was running? Answer: Yes. 10. If you should answer question numbered nine 'yes' then answer this: Was such negligence a proximate cause of plaintiff's injury? Answer: Yes. 11. Was the plaintiff guilty of any negligence which proximately contributed to his injury? Answer: No. 12. If you should answer the eleventh question 'yes' then answer this: Was the said negligence of Kane greater than that of the plaintiff? Answer: (No answer.) 13. If you should answer the twelfth question 'yes' then did such negligence contribute in a greater degree to the plaintiff's injury than did that of the plaintiff? Answer: (No answer.) 14. What sum will justly compensate the plaintiff for the injuries sustained by him? Answer: $7,815.00. Seven thousand eight hundred and fifteen dollars."

The usual motions were made by the defendant, for judgment notwithstanding the verdict, for correction of the verdict and judgment thereon as corrected, and, in event of denial of these motions,

for a new trial. All of the motions being overruled, judgment was rendered for the plaintiff on the verdict, and the defendant appeals.

391 WINSLOW, *C. J.*:

The appellant makes five contentions, viz: (1) that the plaintiff was guilty of contributory negligence as matter of law; (2) that the engineer of the engine was not acting within the scope of his employment when the accident happened; (3) that the court erred in refusing to receive evidence tending to show that plaintiff was employed in interstate commerce at the time of his injury; (4) that the court erred in admitting in evidence proof as to pulmonary tuberculosis, and in failing to instruct the jury that there was no evidence that the accident caused his tuberculosis condition, and (5) that the damages are excessive. These contentions will be discussed in their order.

I. The first contention is based principally upon the plaintiff's own admissions to the effect that he did not look to the south to see whether an engine was coming before he started to walk northward, that he knew it was dangerous to walk northward from the pit, either on the track or close to the track, because it was a common occurrence for an engine to move along over this space without giving the proper signals, and that notwithstanding this fact and the fact that he could not see to the southward, he started to cross the track. In addition to these admissions, the defendant insists that the plaintiff's claim that he listened and could not hear the signal and necessary noises of the engine as it approached is incredible.

These considerations were certainly amply sufficient to justify the jury in holding the plaintiff guilty of contributory negligence, but the question whether they would justify the court in so holding is a very different one. The plaintiff's testimony went further, however: he testified (and in this he is fully corroborated by other testimony)

392 that a yard regulation existed requiring incoming engineers to stop their engines and leave them for the "engine dispatchers" to take charge of before reaching the cender pit, that as he walked northward he walked west of the track in a beaten path and not on the track itself; that he stopped before attempting to cross the track, and while he was still in a place of safety (namely, the clearance space between the track and the coal shed), and listened for somewhere from two to four or five seconds; that he heard no engine nor engine bell; that the only sound he could hear was a hissing noise which he thought was the noise produced by the throwing of water on the hot cinders in the pit, that he concluded that everything was clear, and then started to step across the track.

We are unable to say that this testimony is incredible; we suppose it is matter of common knowledge that a "drifting" engine frequently makes little noise; it may well be that under circumstances such as were testified to here the noise of the relief valve of such an engine might be so merged into the hissing of the water being thrown upon the cinders as to be indistinguishable. Taking into consideration the fact that there was a yard regulation requiring the stopping of all engines south of the pit and the further fact that yard men must

necessarily be frequently upon and about the tracks in the performance of their duties, we are unable to say that the plaintiff's conduct here was negligent as matter of law.

II. The engineer of the locomotive testified that he knew of the bulletin requiring engines to stop south of the pit to be delivered to the "engine dispatcher," but that he took his engine north to save himself walking; that he had to go to the roundhouse to leave his clothes, and that he aways took his engine north as far as the
393 water tank if there were no engines there, and the "engine dispatcher" received it at that place. From these facts it is argued that the engineer was not only disobeying orders, but was not within the scope of his employment, hence that his master is not responsible for his negligent act. The contention as clearly untenable. The engineer's duty was to deliver his engine to the "engine dispatcher"; he was directed to do that at a certain place, but he chose to do it at another place; in so doing he violated orders but was still within the scope of his employment. This subject has been gone over so recently that it is unnecessary to enlarge on it again. The principle is that if a servant is endeavoring to forward his master's business, but is guilty of negligence or even violation of orders in his endeavor, he will violate his duty to his master, but he will still be within the scope of his employment so far as third persons are concerned. Were it otherwise there would apparently be no redress against the master for injuries received by third persons at the hands of negligent or disobedient servants. Ratcliffe vs. C., M. & St. P. Ry. Co. (present term).

III. The complaint does not allege that the defendant was engaged in interstate commerce or that the engine in question had been handling an interstate train, but simply that the defendant was operating trains and was carrying passengers and freight for hire between Antigo and other cities and villages in Wisconsin; neither did the plaintiff's evidence show that the defendant was transacting an interstate business. When the defendant took the case, however, it offered to show that it and its trains, engines and employees were engaged in hauling cars of freight continuously over this line between points in Illinois, Michigan, and Wisconsn at and prior
394 to the time of the accident; that the engines which were being dispatched at this roundhouse at the time in question were making trips through Michigan to Ashland, making connections with the Watersmeet branch; that the engines running south wouldn't run outside the state; that those going and coming from the south handled refrigerator cars from Chicago. No offer was made to show that the engine in question had been hauling an interstate train or interstate freight, nor that all the engines dispatched at this roundhouse hauled interstate freight or interstate trains. Part of this testimony was received against objection, but ultimately it was all stricken out, and so the question whether the federal employers' liability act controlled the present case was eliminated from the case.

An attempt is made by the respondent to justify this ruling on the ground that the testimony was incompetent and immaterial,

because there is no claim made in the answer that the plaintiff was employed in interstate commerce at the time of his injury. We should be slow to hold to so strict and technical a rule. The statutes of the United States are the law of the land, and not like the statutes of our sister states which must be pleaded and proven in order to be available. Furthermore, the fact that the great railroad systems of the state are continuously engaged in both kinds of commerce must, we think, be so well known as to be matter of common knowledge. We do not find it necessary to decide this question, however, as we are of opinion that the ruling was right on the merits. As it was pointed out in the recent case of Ruck v. C. M. & St. P. Ry. Co. (present term, 140 N. W. Rep., 1074), it is necesary in order to bring a
395 case within the federal act not only that the employer be engaged in interstate commerce, but that the injured employee shall suffer his injury "while he is employed" in interstate commerce. Taking care of an engine after it has completed its run and preparing it for the roundhouse seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply repairing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce. Ruck v. C. M. & St. P. Ry. Co. (supra).

We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff at the time of the accident here was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. Now it may perhaps be correctly held (though we do not decide the question) that a man whose day is spent in dispatching engines all of which are engaged in interstate commerce is in legal effect employed in interstate commerce during the whole day and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; but if, on the other hand, part of the engines dispatched be engaged in interstate business and part in local or intrastate business, we are unable to see how it could be logically said that he was "employed in interstate commerce" all day or during his intervals of leisure. In the present case, as we have seen, there was no offer to show that all the engines dispatched daily by the plaintiff were engaged in interstate commerce. As said before in this opinion, we think it must be considered a mat-
396 ter of common knowledge that the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little, if any, further than this. It was noticeably guarded and indefinite in its purport; every word of it might be admitted to be true and yet it would not be shown that all the engines dispatched at this roundhouse by the plaintiff were engaged in interstate business, nor even that the engine in question had been so engaged. The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish the fact that the plaintiff's entire work consisted of the dispatching of engines engaged in interstate commerce. Error must appear af-

firmatively,—it is not to be presumed. We conclude, therefore, that there was no error in these rulings.

IV. It appears from the evidence that the plaintiff received severe bruises, wounds and contusions on the head, body and hips at the time of the accident, that several ribs were broken and that he was in bed two weeks; that his left arm is still partially paralyzed, that he suffers pain in the left arm and shoulder practically all the time, that he is incapacitated for physical labor, is afflicted with occasional spells of dizziness, and that his average weight is reduced from about 160 pounds to about 130 pounds. The injury was suffered in January, 1911; he was examined by Doctor Connell of Fond du Lac in May, 1912, and it was then found for the first time by examination of his sputum that he had incipient consumption or tuberculosis of the lungs. He testified himself that he had had night sweats and hemorrhages. This testimony was received against objection, and the court refused to instruct the jury, as requested by the defendant, that they could not find that the accident caused the pulmonary
397 tuberculosis from which the plaintiff is suffering. The defendant's contention is that there is no sufficient evidence to establish any causal relation between the physical injury and the tuberculosis which existed more than a year later, and that the relationship between the two is purely conjectural. There was medical testimony to the effect that an injury such as plaintiff received is likely to induce or incite tuberculosis by reducing the natural resistance of the patient, lowering his vitality and putting him in a condition whereby he is unable to withstand infection. If this testimony were the only testimony tending to show a causal relation between the injury and the tuberculosis, we should agree with the defendant's contention. If decreased powers of resistance resulting from an injury are to be considered as a link in the chain of causation between the injury and a disease developing years afterwards, it is very evident that a large, if not almost limitless, field is opened up for speculation by juries in a region where there can be no guide and no probability of just results.

In the present case, however, there was other testimony besides the general testimony above referred to. Dr. E. J. Donohue, who treated the plaintiff for his injuries from the day of the accident in January, 1911, until some time in April following, and gave him a thorough physical examination, including an examination of the sputum, about two weeks before the trial in July, 1912, testified directly as follows:

"Such an injury as the one he sustained would cause tuberculosis. It would decrease the resisting forces, tend to give a chance for infection, and give it a chance to loom up. In other words this germ that is dormant or inactive would or can become active. In my opinion the tubercular condition that I found is the result of this injury, and he is permanently disabled from manual labor."
398 Here is direct testimony by the physician who treated the plaintiff for his injuries for months, and presumably knew more of their nature and extent than any one else. It appears that he had known the plaintiff for years, and had treated his family;

he must have been in a favorable position to judge of the actual as well as the probable effects of such an injury upon the plaintiff. He testified positively that in his opinion the tubercular condition was the result of the injury received. We are unable to say that this testimony is beyond the proper scope of expert medical testimony, and unless we can say that, it seems certain that we cannot hold that a finding that the tuberculosis condition was caused by the accident is purely conjectural.

There are no other contentions which require treatment.

By the COURT: Judgment affirmed.

399 STATE OF WISCONSIN:
In Supreme Court.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM H. GRAY, Defendant in Error.

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause, except such papers as are omitted pursuant to the præcipe filed herein.

That the original writ of error, the petition therefor and order allowing the same, the citation with its service endorsed thereon, the assignment of errors, certificate of lodgment, and a copy of the bond and præcipe are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 24th day of July, A. D. 1913.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of Supreme Court, Wisconsin.

Endorsed on cover: File No. 23,813. Wisconsin Supreme Court. Term No. 232. Chicago & Northwestern Railway Company, plaintiff in error, vs. William H. Gray. Filed August 2d, 1913. File No. 23,813.

INDEX OF CASES.

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

WILLIAM H. GRAY,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF PLAINTIFF IN ERROR.

This cause comes to this court upon writ of error, to review the decision and judgment of the Supreme Court of the State of Wisconsin, affirming a judgment of the Municipal Court of Outagamie County, Wisconsin, wherein it was adjudged that the defendant in error have and recover of the plaintiff in error judgment in the sum of Seven Thousand Nine Hundred Thirty-two Dollars and Fifty-one Cents ($7,932.51) on account of injuries received by him while in the employ of the plaintiff in error.

STATEMENT OF THE CASE.

GENERAL STATEMENT.

On January 19, 1911, Gray was employed at Antigo, Wisconsin, by the Railway Company as an engine dispatcher or hostler (so-

called). While walking across one of the railroad tracks he was struck and injured by an engine.

This action was brought on the theory that Gray was not employed in interstate commerce, and that liability of the Railroad Company existed under the state law. The Railway Company attempted to assert the defense that Gray was employed in interstate commerce, and that the Federal Employers' Liability Act was applicable. The trial court struck out the testimony offered by the Railway Company to establish employment in interstate commerce. The Supreme Court of Wisconsin affirmed this ruling on the ground that the testimony so struck out did not tend to establish that Gray was employed in interstate commerce.

Therefore, the question herein involved is as to whether or not Gray's employment constituted "employment in interstate commerce."

PHYSICAL SITUATION.

Antigo is situated in the eastern central part of Wisconsin. It is on the line of railroad running southward to Chicago, Ill., and running northward to points in the upper Peninsula of Michigan, and also through the State of Michigan to the City of Ashland upon Lake Superior.

The premises surrounding the place of accident are shown on the map opposite page 284 of the Transcript. The central object shown is the roundhouse. East of this, running north and south, are the main tracks and the railroad yards. Running from the roundhouse track south, and connecting with the main tracks south of Third Street, are two principal tracks, one of which is the roundhouse track. To the west of the roundhouse track is the coal shed. To the east of the roundhouse track are the following structures, to-wit: wood bin, water tank, sand house, rest room and blow-off box. On the roundhouse track, extending south from a point nearly opposite the south end of the coal shed, is the clinker pit. This is a pit dug under the track, having stone walls on the west side and north and south ends, but being open on the east side. East of this clinker pit is a depressed track, extending from the north end thereof southerly and joining the roundhouse track on an ascending grade near Third Street. Gondola cars are run in on the depressed track,

and the cinders shoveled into these cars from the clinker or cinder pit. The photograph shown opposite page 285 of the transcript gives a view of this clinker pit looking towards the south.

GRAY'S DUTIES.

The allegations of the complaint (which are supported by the testimony) establish Gray's duties as follows:

(a) To receive the engines when brought into the yards upon their return from trips between various other places and the City of Antigo.

(b) To cause the fire and ashes to be emptied from the fireplace of such engines into the cinder pit, and assisting in the emptying thereof.

(c) To cause the water and steam in the boiler of each engine to be reduced by discharging the same into the blow-off box.

(d) To load the engine with coal from the coal shed.

(e) To fill the engine with water from the water tank.

(f) To load the tender of the engine with kindling wood from the wood pile.

(g) To run each engine so received and dealt with into the roundhouse for housing.

(h) *To occasionally drive the engines in switching cars loaded with freight, wood, cinders and other materials and cars in bad order and about the yards.*

(i) To guard, care for and protect the property of the Railway Company, and *"particularly said cinder pit and its immediate surroundings."*

(j) *To prevent the damage or destruction of said property by fire or other cause.*

(k) To promote and further the interests and welfare of the Railroad Company in and about the yards generally.

(Transcript p. 13.)

Previous to the accident, on the morning in question, several engines had been brought in and put over the cinder pit and their hot coals dumped therein.

The following testimony is material on the question of Gray's duties.

"Q. Isn't it a fact that there is frequently rising from this cinder pit vapor, smoke and steam.

A. Yes, sir.

Q. Engines are cleaned and the fire knocked out on the pit every day, are they not?

A. Yes, sir.

Q. And a good many of them?

A. Yes, sir.

Q. And these coals among them have live coals which hold fire for a considerable length of time?

A. Yes, sir."

(Transcript p. 36.)

"Q. What was the condition of things at the cinder pit that morning?

A. The cinder pit was full of cinders almost; at places it was filled, at other places a little lower, and so on through the pit.

Q. What was the condition with reference to whether or not there were live cinders in it?

A. Yes, there was fire in them.

Q. Go right on and tell the condition of the fire and all about it.

A. *It threw up smoke and gas and steam, a certain amount of steam, made it very disagreeable to work there.*

Q. That was true on that morning?

A. Yes, sir.

Q. *Did you give any directions with reference to quenching the cinders?*

A. Yes, sir.

Q. What did you say?

A. Told the cinder pit man to put the hose on there and put the fire out, *that the stringers would get hot and some big engine would be liable to come along and get into the pit.*

Q. Did he do so?

A. Yes, sir.

Q. *What did you have this hose there for?*

A. *To wet the cinders down.*

Q. *Was that a condition that prevailed frequently?*

A. Yes, sir.

Q. *Live cinders on the pit that you had to wet down?*

A. *Yes, that is, generally there is live coals in the engine in the*

fire box, and you will get an engine once in a while that the fire will be practically out in the fire box.

Q. In other words, *whatever fire is in an engine at the end of a trip is knocked out on the cinder pit?*

A. Yes, sir.

Q. *You said you had been at the round house and came down to this cinder pit. What did you go there for?*

A. I went to the sand house *and I went down to see if those men were putting the fire out properly.*

. . . . . .

Q. *What did you find the condition to be there then?*

A. I found the man standing there with his back towards the shed or a little towards the south with the hose in *his hands putting the fire out. I looked at him for a short while and started back to the shanty."*

(Transcript pp. 66 and 67.)

"Q. But when you came to hostle 114 the fumes and smoke from the dump bothered you when you were on the engine?

A. Yes, sir.

Q. And that time just before you moved the engine off the cinder pit you told Krieska to throw water on there, did you?

A. Yes, sir.

Q. *That hose was kept there and used constantly for that purpose?*

A. *Yes, that is what it was there for.*

Q. One of the ordinary operations wasn't it—*that when you were dumping coal some one would pour water right on it the same time?*

A. Yes, sir.

Q. Who generally did that?

A. The cinder pit man.

Q. Had they been doing it all that morning or not?

A. No, sir.

Q. They had not been doing it?

A. They hadn't been doing it the way they ought to.

Q. Were the cinder pit men under your directions?

A. *I was supposed to look after the interest of the pit and the surroundings.*

Q. *You had to take care of the coal so that it would not interfere with the dispatching of the engines?*

A. Yes, sir.

Q. *And you had a right to tell him what to do about that and you did tell him, did you?*

A. Yes, sir."

(Transcript pp. 82 and 83.)

MANNER OF ACCIDENT.

As stated, several engines had had their fire dumped over the cinder pit early in the morning, and pretty well filled the same up with hot cinders, which were afire. When the last engine previous to the accident was dumped, it had thrown fumes up so as to make it difficult to handle the engines on the cinder pit, and also it was endangering the steel cross ties and supports to the rails over the cinder pit.

Gray directed his cinder pit man to throw water, by means of the hose, on to the cinder pit so as to cool it off, and not let the stringers get hot so that any engine would be liable to go down into the pit. (Transcript pp. 66, 82 and 83.)

After giving these directions Gray went up town near the depot to get his time check cashed. (Transcript pp. 84 and 85.) He returned direct from town to the roundhouse. (Transcript p. 89.) From the roundhouse he walked south on the roundhouse track to the cinder pit, where he went for the purpose of seeing whether his orders as to the wetting down of the cinders were being carried out. (Transcript p. 67.)

As the Supreme Court of Wisconsin says:

"When he left the roundhouse he saw so much steam and smoke rising from the cinder pit that he concluded that he ought to ascertain whether the cinder pit man, Krieska, was performing his duty in putting out the fire in the cinder pit."

(Transcript p. 287.)

He there found the cinder pit man, Krieska, throwing water on the hot cinders with the hose; he looked at him a short while and started back to his shanty or rest room. (Transcript p. 67.) The wind was in the south, and there was considerable smoke and steam coming off from the cinders blowing north along the roundhouse track and east of the coal shed. He walked between the coal shed and the track to a point nearly opposite his shanty or rest room. He was then surrounded by steam and smoke. He stopped and listened for a second, and hearing nothing started to cross the track, when he was struck and injured by a light engine coming from the south.

Thus we see that the last duty performed by Gray prior to his accident was his visit to the cinder pit to ascertain whether his orders

and instructions were being carried out, and that he was injured while returning therefrom to his shanty or rest room.

ISSUES AND TRIAL.

Up to the time when the defendant took the case there was no testimony directly showing that the Railway Company and its engines were engaged or employed in Interstate Commerce at the place in question.

Defendant called R. F. Armstrong to the stand and asked him the following questions:

"Q. At and prior to the plaintiff's accident was the North Western Road, its trains, engines and employes engaged in hauling cars of freight continuously between Michigan, and State of Wisconsin and points in Illinois and State of Wisconsin?

A. Yes, sir."

(Transcript p. 236.)

Upon motion this answer was struck out, the court assigning the reason as follows:

"The only question is as to *this* engine as I can see it; *the engine on which this person was engaged at the time.*"

(Transcript pp. 236 and 237.)

Thereupon the following testimony was given by Mr. Armstrong without objection, to-wit:

"The engines being hostled at this roundhouse were making trips from Antigo to Ashland, *going through the State of Michigan;* some of the engines and trains were making connection with the Watersmeet branch (in Michigan). While the engines going south would not run outside of the state, yet they handled refrigerator cars from Chicago; the dispatcher works under the supervision of the foreman of the roundhouse; the roundhouse is a place where all these engines come in from runs to rest; they are cleaned of all their coal and cinders and supplied with wood and water, etc., for the next trip; some light repairs are done in the roundhouse; the dispatcher takes the engine after the train crew leaves it and does these very things, and then puts it in the roundhouse."

(Transcript p. 237.)

Thereupon the plaintiff's attorney moved to strike out all of the last above testimony in so far as it related to interstate traffic, and tended to show employment in Interstate Commerce, *which motion was granted.* (Transcript p. 238.)

Thereafter the case was submitted to the jury under a special verdict in accordance with the Wisconsin Railroad Law.

(Transcript pp. 269 and 270.)

Defendant duly moved for a new trial because of errors of the court (among other things) in the exclusion of testimony. (Transcript p. 272.) This motion was denied and exception taken. (Transcript pp. 273-274.)

Thereupon an appeal was duly taken to the Supreme Court of the State of Wisconsin.

DECISION OF WISCONSIN SUPREME COURT.

The opinion of the Wisconsin Supreme Court (Transcript pp. 286-293) discloses that in that court the Railway Company assigned as error the ruling of the Trial Court "in refusing to receive evidence tending to show that plaintiff was employed in interstate commerce at the time of his injury." (Transcript p. 289.)

The following is that part of the court's opinion:

"III. The complaint does not allege that the defendant was engaged in Interstate Commerce or that the engine in question had been handling an interstate train, but simply that the defendant was operating trains and was carrying passengers and freight for hire between Antigo and other cities and villages in Wisconsin; neither did the plaintiff's evidence show that the defendant was transacting an interstate business. When the defendant took the case, however, *it offered to show that it and its trains, engines and employes were engaged in hauling cars of freight continuously over this line between points in Illinois, Michigan and Wisconsin at and prior to the time of the accident; that the engines which were being dispatched at this roundhouse at the time in question were making trips through Michigan to Ashland, making connections with the Watersmeet branch; that the engines running south wouldn't run outside the state; that those going and coming from the south handled refrigerator cars from Chicago. No offer was made to show that the engine in question had been hauling an interstate train or interstate freight, nor that all the*

engines dispatched at this roundhouse hauled interstate freight or interstate trains. Part of the testimony was received against objection, but ultimately it was all stricken out, and so the question whether the federal employers' liability act controlled the present case was eliminated from the case.

An attempt is made by the respondent to justify this ruling on the ground that the testimony was incompetent and immaterial, because there is no claim made in the answer that the plaintiff was employed in interstate commerce at the time of his injury. We should be slow to hold to so strict and technical a rule. The statutes of the United States are the law of the land, and not like the statutes of our sister states which must be pleaded and proven in order to be available. Furthermore, the fact that the great railroad systems of the state are continuously engaged in both kinds of commerce must, we think, be so well known as to be matter of common knowledge. We do not find it necessary to decide this question, however, as we are of opinion that the ruling was right on the merits. As it was pointed out in the recent case of Ruck vs. C. M. & St. P. Ry. Co. (present term, 140 N. W. Rep., 1074), it is necessary in order to bring a case within the federal act not only that the employer be engaged in interstate commerce, but that the injured employe shall suffer his injury 'while he is employed' in interstate commerce. *Taking care of an engine after it has completed its run and preparing it for the roundhouse seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply repairing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce.* Ruck vs. C. M. & St. P. Ry. Co. (supra).

We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff at the time of the accident here was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. *Now it may perhaps be correctly held (though we do not decide the question) that a man whose day is spent in dispatching engines all of which are engaged in interstate commerce is in legal effect employed in interstate commerce during the whole day and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; but if, on the other hand, part of the engines dispatched be engaged in interstate business and part in local or intrastate business, we are unable to see how it could be logically said that he was "employed in interstate commerce" all day or during his intervals of leisure.* In the present case, as we have seen, there was *no offer to show that all the engines dispatched daily by the plaintiff were engaged in interstate commerce.* As said before in this opinion, we think it must be considered a matter of common knowledge that

the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little, if any, further than this. It was noticeably guarded and indefinite in its purport; every word of it might be admitted to be true and yet it would not be shown that all the engines dispatched at this roundhouse by the plaintiff were engaged in interstate business, or even that the engine in question had been so engaged. The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish *the fact that the plaintiff's ENTIRE work consisted of the dispatching of engines engaged in interstate commerce.* Error must appear affirmatively—it is not to be presumed. We conclude, therefore, that there was no error in these rulings."

SPECIFICATION OF ERRORS.

First: The Supreme Court erred in construing that Act of Congress, to-wit, the Act of April 22, 1908, 35 Statutes, 65, Chapter 149, and the amendment thereof under date of April 5, 1910, 36 Statutes, 290, commonly known as the Federal Employers' Liability Act, and in denying to the Plaintiff in Error the right, privilege and immunity specially set up and claimed by it under the said Act aforesaid, which errors are more particularly set forth as follows, to-wit:

The Supreme Court of Wisconsin erred in holding and deciding:

First: That the employment in which the said William H. Gray was engaged at the time of his injury under the evidence admitted and offered did not constitute *employment in commerce between the several states.*

Second: That the said William H. Gray, under the evidence admitted and offered, was not injured while employed in commerce between the several states.

Third: That in order to constitute "employment in commerce between the several states" an engine dispatcher must be employed exclusively in dispatching engines in interstate commerce; that an engine dispatcher whose duties require him to dispatch alternatively engines engaged in intrastate and interstate commerce, if injured while waiting for engines to be turned over to him to be dispatched,

is not then "employed in commerce between the several states," and such employe is not injured "while he is employed in commerce between the several states"; that the employment of an engine dispatcher in taking care of engines immediately after their return from interstate trips does not constitute "employment in commerce between the several states." (See Assignment of Errors, Transcript pp. 2 and 3.)

ARGUMENT.

But one question is presented by this record, and that is the following:

Was William H. Gray, under the Evidence Admitted, and the Evidence Excluded, Employed in Interstate Commerce?

Restating the material facts, they are as follows:

First: The Railway Company, at the time and place, was engaged in Interstate Commerce.

Second: The engines dispatched at the roundhouse at Antigo hauled trains to Ashland through Michigan and also to the Watersmeet branch in Michigan; hauled trains bound to and from Chicago, some of which contained refrigerator cars and interstate freight; no proof that *all* engines at *all* times handled interstate freight.

Third: The duties of Gray and his assistants were to take engines coming in off the road, dump their cinders in the cinder pit, fill them with coal and water and kindling, and then house them in the roundhouse; *keep the cinders shoveled out of the cinder pit; keep the cinders wet down with water and free from fire so as not to destroy the rails and ties over the cinder pit and endanger the engines; to exercise authority and jurisdiction over the cinder pit man; to look after, watch, guard and protect the cinder pit.*

Fourth: On the morning in question the accumulation of hot cinders had endangerd the cinder pit. Gray gave orders that they be wet down and cooled off; while waiting for another engine to arrive which he could dispatch *he went to the cinder pit to observe the con-*

dition thereof and see whether his orders were being carried out, and when returning therefrom to his shanty to wait for another engine to be dispatched he received the injury in question.

The "employment" of Gray has two aspects:

First: He must clean, coal, water and house *both* state and interstate engines. From necessity each engine must be handled separately.

Second: He must maintain, watch over and keep in condition the cinder pit and the ties and rails thereover; he must keep the cinders shoveled out of the cinder pit, keep them wetted down and cooled, so the heat and fire will not destroy the rails and the steel ties. Otherwise, his engines while being cleaned, may fall into the pit.

We submit that his employment, in its second aspect, does not differ in any respect from the employment of the bridge repairer, or the section man, who is repairing or maintaining that part of the permanent system of the railroad which is devoted to intrastate and interstate commerce.

Within the rule of the Pederson case, 229 U. S., 146, Gray was employed, while performing these duties, in interstate commerce.

While the citation of this case should be deemed sufficient, yet we desire to call the court's attention to applications of the rule, and principle thereof, by other and inferior tribunals.

In *Barlow vs. Lehigh Railway Company,* 143 N. Y. Supp., 1053, where an employe was switching coal, which was to be used by both state and interstate engines indiscriminately, it was held that he was employed in interstate commerce.

So the unloading of oil intended to be used as fuel for state and interstate engines constitutes interstate enployment.

Montgomery Southern Pacific Railway Company, 131 Pac., 507.

Where a pumper who pumped water in tanks, from which state and interstate engines drew their water, was injured, while riding on his hand car to work, his employment was held to be interstate.

Horton vs. Oregon Navigation Company, 130 Pac., 897.

The wheeling of coal to be used for a repair shop where state and interstate engines were repaired constitutes interstate employment.

Cousins vs. Illinois Central Railway Company, 148 N. W., p. 58.

In the Merkl Case, 198 Fed., 1, (C. C. A.) the employe was engaged in repairing a refrigerator car which was indiscriminately used in both kinds of service, sometimes in one and sometimes in the other.

Held that he was employed in interstate commerce.

Also *Missouri K. & T. Ry. vs. Demahy Co.,* 165 S. W., 529; *Winters vs. Minneapolis & St. L. R. Co.,* 148 N. W., 106.

Thus it seems clear that if Gray had been injured *while standing at the cinder pit, and actually engaged in supervising the wetting down of the cinders,* there could be no question but that he was then employed in interstate commerce. It matters not, under the authorities as we read them, that at the moment of injury he was *walking to or from his place of employment.*

North Carolina Railway Company vs. Zachary, 232 U. S., 248.
St. Louis, San Francisco & T. Ry. Co. vs. Seale, 229 U. S. 156.
I. C. R. Co. vs. Nelson, 203 Fed., 951 (C. C. A.);
Lamphere Case, 196 Fed., 336;
Rentz Case, 162 S. W., 959;
San Pedro Railway Co. vs. Davide, 210 Fed., 870 (C. C. A.);
St. Louis & Southwestern Railway Company vs. Brothers, 165 S. W., 488;
Sanders vs. Charleston Railway Company, 81 S. E. 283.

I further submit that his employment, in its first aspect, constitutes interstate employment. At the moment of his injury he was returning to his rest shanty, where he would await the arrival of another engine. It was not shown, and then probably could not be known, whether such engine would be one hauling interstate freight or intrastate freight. He would not only handle that engine, but all others that would come after it later in the day. This was early in the day.

As stated by the Wisconsin Supreme Court in its opinion (Transcript p. 287), about thirty engines were dispatched each twenty-four hours. While going to such work, or waiting for it, his employment was as much interstate commerce as if it were definitely ascertained that the very next engine would be an interstate engine. It was his duty then to await and dispatch all of the engines then out on the road running towards Antigo, both state and interstate. It seems ridiculous to argue that the character of his employment during the period of waiting must be determined by the merest chance that the next arriving engine is either an intrastate or an interstate engine. It is likewise ridiculous to argue that the character of his employment is changed because of the fact that these engines arrived singly rather than in numbers, constituting a train.

We submit that the case is identical with the situation in *St. Louis, San Francisco & T. Ry. Co. vs. Seale,* 229 U. S., 156.

There a car checker was going through the yards to a place where he was to await the arrival of a train which would bring both state and interstate cars. It was his duty to examine the cars, make a record of the numbers and initials, and to inspect and make a record of the seals on the car doors. Of course, he had to handle each car separately. It might well have been argued in that case that because he had to handle each car separately he was not, while approaching his work, engaged in interstate commerce.

This court, however, held, as stated in the syllabus:

"An employe, whose duty is to take numbers of and seal up and label cars, some of which are engaged in interstate and some in intrastate traffic is directly, and not indirectly, engaged in interstate commerce."

I submit that the mere fact that these mixed cars arrived in a single train is wholly immaterial. Thus we conclude that in both of its aspects Gray's employment was interstate.

It may be profitable to discuss the opinion of the State Supreme Court. That case was argued April 30th and decided May 31st, 1913. Both the Pederson and the Seale cases, supra, were decided May 26, 1913, only five days before the decision in this case, and these decisions were not then published or known.

At that time the law was in a state of great uncertainty. But

little had been said by this court on the question as to what constituted interstate employment. The State Courts were groping around trying to find the light. Just previous to the decision in this case the Wisconsin Supreme Court had decided the case of Ruck vs. C. M. & St. Paul Railway Company, 153 Wis., 158, wherein it held that a mechanic, who was injured while engaged in repairing a wrecker outfit, which outfit at times was used in both intrastate and interstate commerce, was not employed in interstate commerce.

The case did not go on the proposition that the wrecker outfit was alternately used for both kinds of commerce, but went on the point that work in making repairs on mere appliances or premises was too remote from the actual moving of interstate commerce to constitute employment therein. From the cases above cited it now seems obvious that this was an erroneous deduction.

In addition to the cases already cited see the following cases on the question of repairing appliances and premises used in interstate commerce.

Gaines vs. Detroit Railway Company, 148 N. W., 397.
Freeman, Receiver, vs. Powell, 144 S. W., 1033.
Zachary Case, 232 U. S., 248.
Eng vs. Southern Pacific, 210 Fed., 92.
Armbruster Case, 147 N. W., 338.

In the latter case it is held that the coaling of an engine to go out on an interstate trip constitutes interstate employment.

Most, if not all of these cases, draw their inspiration and application from the Pederson and Seale cases, and it is now clearly apparent that the Ruck case was wrongfully decided by the Wisconsin Supreme Court.

In Graber vs. Duluth, South Shore & Atlantic Ry., 150 N. W., p.489 decided Jan. 12, 1915, the Wisconsin Supreme Court cited the Pederson, Zachary and Behrens (233 U. S., 473) Cases.

There a brakeman arrived at the terminal on an interstate train, finished up his train work, went from the Railroad Company premises to get a drink of liquor, and was injured while crossing the railroad yards to go to the depot to meet his conductor and ascertain if there were any further orders, and the court held that at the time of the injury he was engaged in interstate commerce. This case should be

read to understand the new view of the law taken by the Wisconsin Supreme Court.

Starting with the false premise adopted by it in the Ruck case, the Wisconsin Supreme Court makes its first proposition (Transcript p. 291), to-wit:

"Taking care of an engine after it has completed its run, and preparing it for the roundhouse, seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply preparing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce."

The Court then proceeds to its next premise, which we see from the above authorities is likewise false. This is, that one, while awaiting the arrival of other engines which may be state or interstate, cannot be said to be "employed in interstate commerce" during the hours of his *leisure.*

The court concludes as follows:

"The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish the fact that the plaintiff's *entire work* consisted of dispatching engines engaged in interstate commerce."

(Transcript, p. 291.)

It should be specially noted that the Wisconsin Supreme Court did not fully state the facts in relation to, or discuss, what we have herein called the "second aspect" of Gray's employment. It probably considered this immaterial because of the view of the first premise, to-wit, the dispatching of an engine was like repairing it and, therefore, the maintenance and repairs of the cinder pit and track thereover were of the same character.

In *Colasurdo vs. Central Railway Company,* 180 Fed., 832; affirmed, 192 Fed., 901 (C. C. A.), followed and approved in *Horton vs. Oregon Navigation Company,* 130 Pac., 897, the Court, in referring to the Federal Employers' Liability Act, and the construction placed thereon by this court, well said:

"The Act meant to include everybody whom Congress *could* include."

It seems to us that this is the true test. The question then is, can it be held, by any reasonable construction, that Gray's employment was interstate. It is almost a matter of common knowledge that on the main lines of the great interstate railroads, like the Chicago and North Western Railroad, the great bulk of the business in interstate. The products of the forest, the factory and the farm must be carried into the great interstate markets. The return trips of the cars must bring in the manufactured products of the great industrial centers, the meats, the oils, clothing, boots and shoes, coffees, teas and refrigerated foods. It was Gray's duty to handle every engine (during his portion of the day) that hauled all this great bulk of commerce. He must maintain his appliances, his bars and picks and rods, his cinder pit, his track and premises so as to carry on this work. The employment is single and entire. When he is going to the premises in the morning and returning at night he is approaching and returning from one employment, not two. It is unreasonable to say or to hold that because by chance some engine may haul a passenger train on which there is no interstate passenger, or a freight train on which there is no interstate shipment, therefore, while waiting between the arrival of trains he is not engaged in interstate commerce. *Reducing the argument to an absurdity, it must likewise follow that while waiting he is not employed in intrastate commerce.*

Therefore, we submit that in both of its aspects Gray's employment was interstate, and the Wisconsin Supreme Court erred in its holding to the contrary.

EDWARD M. SMART,

Solicitor and Counsel for Plaintiff in Error,
Chicago and North Western Railway Company.

Service of the foregoing brief is hereby accepted and delivery
a copy thereof is hereby acknowledged this ..... day
February, A. D. 1915.

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Attorney for Plaintiff in Error.

.....

Attorney for Defendant in Error.

INDEX OF CASES.

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM H. GRAY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

AMENDED BRIEF OF PLAINTIFF IN ERROR.

This cause comes to this court upon writ of error, to review the decision and judgment of the Supreme Court of the State of Wisconsin, affirming a judgment of the Municipal Court of Outagamie County, Wisconsin, wherein it was adjudged that the defendant in error have and recover of the plaintiff in error judgment in the sum of Seven Thousand Nine Hundred Thirty-two Dollars and Fifty-one Cents ($7,932.51) on account of injuries received by him while in the employ of the plaintiff in error.

STATEMENT OF THE CASE.

GENERAL STATEMENT.

On January 19, 1911, Gray was employed at Antigo, Wisconsin, by the Railway Company as an engineer dispatcher or hostler (so-

called). While walking across one of the railroad tracks he was struck and injured by an engine.

This action was brought on the theory that Gray was not employed in interstate commerce, and that liability of the Railroad Company existed under the state law. The Railway Company attempted to assert the defense that Gray was employed in interstate commerce, and that the Federal Employers' Liability Act was applicable. The trial court struck out the testimony offered by the Railway Company to establish employment in interstate commerce. The Supreme Court of Wisconsin affirmed this ruling on the ground that the testimony so struck out did not tend to establish that Gray was employed in interstate commerce.

Therefore, the question herein involved is as to whether or not Gray's employment constituted "employment in interstate commerce."

PHYSICAL SITUATION.

Antigo is situated in the eastern central part of Wisconsin. It is on the line of railroad running southward to Chicago, Ill., and running northward to points in the upper Peninsula of Michigan, and also through the State of Michigan to the City of Ashland upon Lake Superior.

The premises surrounding the place of accident are shown on the map opposite page 284 of the Transcript. The central object shown is the roundhouse. East of this, running north and south, are the main tracks and the railroad yards. Running from the roundhouse track south, and connecting with the main tracks south of Third Street, are two principal tracks, one of which is the roundhouse track. To the west of the roundhouse track is the coal shed. To the east of the roundhouse track are the following structures, to-wit: wood bin, water tank, sand house, rest room and blow-off box. On the roundhouse track, extending south from a point nearly opposite the south end of the coal shed, is the clinker pit. This is a pit dug under the track, having stone walls on the west side and north and south ends, but being open on the east side. East of this clinker pit is a depressed track, extending from the north end thereof southerly and joining the roundhouse track on an ascending grade near Third Street. Gondola cars are run in on the depressed track,

and the cinders shoveled into these cars from the clinker or cinder pit. The photograph shown opposite page 285 of the transcript gives a view of this clinker pit looking towards the south.

GRAY'S DUTIES.

The allegations of the complaint (which are supported by the testimony) establish Gray's duties as follows:

(a) To receive the engines when brought into the yards upon their return from trips between various other places and the City of Antigo.

(b) To cause the fire and ashes to be emptied from the fireplace of such engines into the cinder pit, and assisting in the emptying thereof.

(c) To cause the water and steam in the boiler of each engine to be reduced by discharging the same into the blow-off box.

(d) To load the engine with coal from the coal shed.

(e) To fill the engine with water from the water tank.

(f) To load the tender of the engine with kindling wood from the wood pile.

(g) To run each engine so received and dealt with into the roundhouse for housing.

(h) *To occasionally drive the engines in switching cars loaded with freight, wood, cinders and other materials and cars in bad order and about the yards.*

(i) To guard, care for and protect the property of the Railway Company, and *"particularly said cinder pit and its immediate surroundings."*

(j) *To prevent the damage or destruction of said property by fire or other cause.*

(k) To promote and further the interests and welfare of the Railroad Company in and about the yards generally.

(Transcript p. 13.)

Previous to the accident, on the morning in question, several engines had been brought in and put over the cinder pit and their hot coals dumped therein.

The following testimony is material on the question of Gray's duties.

"Q. Isn't it a fact that there is frequently rising from this cinder pit vapor, smoke and steam?

A. Yes, sir.

Q. Engines are cleaned and the fire knocked out on the pit every day, are they not?

A. Yes, sir.

Q. And a good many of them?

A. Yes, sir.

Q. And these coals among them have live coals which hold fire for a considerable length of time?

A. Yes, sir."

(Transcript p. 36.)

"Q. What was the condition of things at the cinder pit that morning?

A. The cinder pit was full of cinders almost; at places it was filled, at other places a little lower, and so on through the pit.

Q. What was the condition with reference to whether or not there was live cinders in it?

A. Yes, there was fire in them.

Q. Go right on and tell the condition of the fire and all about it.

A. *It threw up smoke and gas and steam, a certain amount of steam, made it very disagreeable to work there.*

Q. That was true on that morning?

A. Yes, sir.

Q. *Did you give any directions with reference to quenching the cinders?*

A. Yes, sir.

Q. What did you say?

A. Told the cinder pit man to put the hose on there and put the fire out, *that the stringers would get hot and some big engine would be liable to come along and get into the pit.*

Q. Did he do so?

A. Yes, sir.

Q. *What did you have this hose there for?*

A. *To wet the cinder down.*

Q. *Was that a condition that prevailed frequently?*

A. Yes, sir.

Q. *Live cinders on the pit that you had to wet down?*

A. *Yes, that is, generally there is live coals in the engine in the*

fire box, and you will get an engine once in a while that the fire will be practically out in the fire box.

Q. In other words, *whatever fire is in an engine at the end of a trip is knocked out on the cinder pit?*

A. Yes, sir.

Q. *You said you had been at the round house and came down to this cinder pit. What did you go there for?*

A. I went to the sand house *and I went down to see if those men were putting the fire out properly.*

. . . . . .

Q. *What did you find the condition to be there then?*

A. I found the man standing there with his back towards the shed or a little towards the south with the hose in *his hands putting the fire out. I looked at him for a short while and started back to the shanty."*

(Transcript pp. 66 and 67.)

"Q. But when you came to hostle 114 the fumes and smoke from the dump bothered you when you were on the engine?

A. Yes, sir.

Q. And that time just before you moved the engine off the cinder pit you told Krieska to throw water on there, did you?

A. Yes, sir.

Q. *That hose was kept there and used constantly for that purpose?*

A. *Yes, that is what it was there for.*

Q. One of the ordinary operations wasn't it—*that when you were dumping coal some one would pour water right on it the same time?*

A. Yes, sir.

Q. Who generally did that?

A. The cinder pit man.

Q. Had they been doing it all that morning or not?

A. No, sir.

Q. They had not been doing it?

A. They hadn't been doing it the way they ought to.

Q. Were the cinder pit men under your directions?

A. *I was supposed to look after the interest of the pit and the surroundings.*

Q. *You had to take care of the coal so that it would not interfere with the dispatching of the engines?*

A. Yes, sir.

Q. *And you had a right to tell him what to do about that and you did tell him, did you?*

A. Yes, sir."

(Transcript pp. 82 and 83.)

MANNER OF ACCIDENT.

As stated, several engines had had their fire dumped over the cinder pit early in the morning, and pretty well filled the same up with hot cinders, which were afire. When the last engine previous to the accident was dumped, it had thrown fumes up so as to make it difficult to handle the engines in the cinder pit, and also it was endangering the steel cross ties and supports to the rails over the cinder pit.

Gray directed his cinder pit man to throw water, by means of the hose, on to the cinder pit so as to cool it off, and not let the stringers get hot so that any engine would be liable to go down into the pit. (Transcript pp. 66, 82 and 83.)

After giving these directions Gray went up town near the depot to get his time check cashed. (Transcript pp. 84 and 85.) He returned direct from town to the roundhouse. (Transcript p. 89.) From the roundhouse he walked south on the roundhouse track to the cinder pit, where he went for the purpose of seeing whether his orders as to the wetting down of the cinders were being carried out. (Transcript p. 67.)

As the Supreme Court of Wisconsin says:

"When he left the roundhouse he saw so much steam and smoke rising from the cinder pit that he concluded that he ought to ascertain whether the cinder pit man, Krieska, was performing his duty in putting out the fire in the cinder pit."

(Transcript p. 287.)

He there found the cinder pit man, Krieska, throwing water on the hot cinders with the hose; he looked at him a short while and started back to his shanty or rest room. (Transcript p. 67.) The wind was in the south, and there was considerable smoke and steam coming off from the cinders blowing north along the roundhouse track and east of the coal shed. He walked between the coal shed and the track to a point nearly opposite his shanty or rest room. He was then surrounded by steam and smoke. He stopped and listened for a second, and hearing nothing started to cross the track, when he was struck and injured by a light engine coming from the south.

Thus we see that the last duty performed by Gray prior to his accident was his visit to the cinder pit to ascertain whether his orders

and instructions were being carried out, and that he was injured while returning therefrom to his shanty or rest room.

ISSUES AND TRIAL.

Up to the time when the defendant took the case there was no testimony directly showing that the Railway Company and its engines were engaged or employed in Interstate Commerce at the place in question.

Defendant called R. F. Armstrong to the stand and asked him the following questions:

"Q. At and prior to the plaintiff's accident was the North Western Road, its trains, engines and employes engaged in hauling cars of freight continuously between Michigan, and State of Wisconsin and points in Illinois and State of Wisconsin?

A. Yes, sir."

(Transcript p. 236.)

Upon motion this answer was struck out, the court assigning the reason as follows:

"The only question is as to *this* engine as I can see it; *the engine on which this person was engaged at the time.*"

(Transcript pp. 236 and 237.)

Thereupon the following testimony was given by Mr. Armstrong without objection, to-wit:

"The engines being hostled at this roundhouse were making trips from Antigo to Ashland, *going through the State of Michigan;* some of the engines and trains were making connection with the Watersmeet branch (in Michigan). While the engines going south would not run outside of the state, yet they handled refrigerator cars from Chicago; the dispatcher works under the supervision of the foreman of the roundhouse; the roundhouse is a place where all these engines come in from runs to rest; they are cleaned of all their coal and cinders and supplied with wood and water, etc., for the next trip; some light repairs are done in the roundhouse; the dispatcher takes the engine after the train crew leaves it and does these very things, and then puts it in the roundhouse."

(Transcript p. 237.)

Thereupon the plaintiff's attorney moved to strike out all of the last above testimony in so far as it related to interstate traffic, and tended to show employment in Interstate Commerce, *which motion was granted.* (Transcript p. 238.)

Thereafter the case was submitted to the jury under a special verdict in accordance with the Wisconsin Railroad Law.

(Transcript pp. 269 and 270.)

Defendant duly moved for a new trial because of errors of the court (among other things) in the exclusion of testimony. (Transcript (p. 272). This motion was denied and exception taken. (Transcript pp. 273-274.)

Thereupon an appeal was duly taken to the Supreme Court of the State of Wisconsin.

DECISION OF WISCONSIN SUPREME COURT.

The opinion of the Wisconsin Supreme Court (Transcript pp. 286-293) discloses that in that court the Railway Company assigned as error the ruling of the Trial Court "in refusing to receive evidence tending to show that plaintiff was employed in interstate commerce at the time of his injury." (Transcript p. 289.)

The following is that part of the court's opinion:

"III. The complaint does not allege that the defendant was engaged in Interstate Commerce or that the engine in question had been handling an interstate train, but simply that the defendant was operating trains and was carrying passengers and freight for hire between Antigo and other cities and villages in Wisconsin; neither did the plaintiff's evidence show that the defendant was transacting an interstate business. When the defendant took the case, however, *it offered to show that it and its trains, engines and employes were engaged in hauling cars of freight continuously over this line between points in Illinois, Michigan and Wisconsin at and prior to the time of the accident; that the engines which were being dispatched at this roundhouse at the time in question were making trips through Michigan to Ashland, making connections with the Watersmeet branch; that the engines running south wouldn't run outside the state; that those going and coming from the south handled refrigerator cars from Chicago. No offer was made to show that the engine in question had been hauling an interstate train or interstate freight, nor that all the*

engines dispatched at this roundhouse hauled interstate freight or interstate trains. Part of the testimony was received against objection, but ultimately is was stricken out, and so the question whether the federal employers' liability act controlled the present case was eliminated from the case.

An attempt is made by the respondent to justify this ruling on the ground that the testimony was incompetent and immaterial, because there is no claim made in the answer that the plaintiff was employed in interstate commerce at the time of his injury. We should be slow to hold to so strict and technical a rule. The statutes of the United States are the law of the land, and not like the statutes of our sister states which must be pleaded and proven in order to be available. Furthermore, the fact that the great railroad systems of the state are continuously engaged in both kinds of commerce must, we think, be so well known as to be matter of common knowledge. We do not find it necessary to decide this question, however, as we are of opinion that the ruling was right on the merits. As it was pointed out in the recent case of Ruck vs. C. M. & St. P. Ry. Co. (present term, 140 N. W. Rep., 1074), it is necessary in order to bring a case within the federal act not only that the employer be engaged in interstate commerce, but that the injured employe shall suffer his injury 'while he is employed' in interstate commerce. *Taking care of an engine after it has completed its run and preparing it for the roundhouse seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply repairing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce.* Ruck vs. C. M. & St. P. Ry. Co. (**supra**).

We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff at the time of the accident here was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. *Now it may perhaps be correctly held (though we do not decide the question) that a man whose day is spent in dispatching engines all of which are engaged in interstate commerce is in legal effect employed in interstate commerce during the whole day and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; but if, on the other hand, part of the engines dispatched be engaged in interstate business and part in local or interstate business, we are unable to see how it could be logically said that he was "employed in interstate commerce" all day or during his intervals of leisure.* In the present case, as we have seen, there was *no offer to show that all the engines dispatched daily by the plaintiff were engaged in interstate commerce.* As said before in this opinion, we think it must be considered a matter of common knowledge that

the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little, if any, further than this. It was noticeably guarded and indefinite in its purport; every word of it might be admitted to be true and yet it would not be shown that all the engines dispatched at this roundhouse by the plaintiff were engaged in interstate business, or even that the engine in question had been so engaged. The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish *the fact that the plaintiff's ENTIRE work consisted of the dispatching of engines engaged in interstate commerce.* Error must appear affirmatively—it is not to be presumed. We conclude, therefore, that there was no error in these rulings."

SPECIFICATION OF ERRORS.

First: The Supreme Court erred in construing that Act of Congress, to-wit, the Act of April 22, 1908, 35 Statutes, 65, Chapter 149, and the amendment thereof under date of April 5, 1910, 36 Statutes, 290, commonly known as the Federal Employers' Liability Act, and in denying to the Plaintiff in Error the right, privilege and immunity specially set up and claimed by it under the said Act aforesaid, which errors are more particularly set forth as follows, to-wit:

The Supreme Court of Wisconsin erred in holding and deciding:

First: That the employment in which the said William H. Gray was engaged at the time of his injury under the evidence admitted and offered did not constitute *employment in commerce between the several states.*

Second: That the said William H. Gray, under the evidence admitted and offered, was not injured while employed in commerce between the several states.

Third: That in order to constitute "employment in commerce between the several states" an engine dispatcher must be employed exclusively in dispatching engines in interstate commerce; that an engine dispatcher whose duties require him to dispatch alternatively engines engaged in intrastate and interstate commerce, if injured while waiting for engines to be turned over to him to be dispatched,

is not then "employed in commerce between the several states," and such employe is not injured "while he is employed in commerce between the several states"; that the employment of an engine dispatcher in taking care of engines immediately after their return from interstate trips does not constitute "employment in commerce between the several states." (See Assignment of Errors, Transcript pp. 2 and 3.)

Fourth: That the Municipal Court did not err in rejecting and striking out the testimony of the witness Armstrong, which was in substance as follows:

"Mr. Armstrong re-called by the defendant.

"I am familiar with the character and kind of business done by the Chicago and North Western Railway Company on our division at Antigo. As I understand it, interstate traffic is the exchange of business between two states.

Q. At and prior to the plaintiff's accident was the North Western road, its trains, engines and employes engaged in hauling cars of freight continuously between Michigan and state of Wisconsin and points in Illinois and state of Wisconsin?

A. Yes, sir.

Moved to have the answer struck out. Motion granted.

Objected to because it does not appear what employes are meant, and further objection is immaterial, incompetent and irrelevant as to whether their engines, their employes and their trains and crews may have or might have been in any respect engaged in interstate traffic, and that the only thing material, if at all, would be the use made of this particular engine, that is the engine on which the plaintiff was hostler.

By the Court: Objection sustained. The only question is as to this engine as I can see it; the engine on which this person was engaged at the time.

By Attorney Martin: My objection goes to all of these questions. 1st. Because the witness is not competent. 2nd. Because the testimony is not admissible under the pleadings. 3rd. The testimony itself is incompetent, irrelevant and immaterial.

Engines that were being hostled at this roundhouse at the time in question were making trips from Antigo to Ashland, going through Michigan. At the same time engines and trains were making connection with the Watersmeet branch (elsewhere appearing to be in Michigan). Engines running south won't run out of the state, but in coming to and going from the south they handle refrigerator cars from Chicago. The dispatcher is under the jurisdiction of the

foreman of the roundhouse, and Mr. Gray was under the dispatcher's jurisdiction. The roundhouse is the place where all these engines that come in from runs there rest. They clean all the coal and cinders out and get wood and water and are put in there to stay until the next trip. Some repairs are done in the roundhouse too. The dispatcher takes the engine, after the train crew leaves it, near the roundhouse. The roundhouse, with the coal shed, sand house and cinder pit and the blow-off box and these other buildings are all crowded together. I know of no definition in the railroad service as to what constitutes employes, or who shall be employed on the road, and no standard is fixed so far as I can see as to where the division line is.

Exhibit "9" is a photograph taken at or near the north end of the cinder pit looking south in the city of Antigo.

The Plaintiff now moves to strike out all the testimony of this witness except his testimony identifying Exhibit "9", for the reason urged in our objection to the testimony when first offered, that is the testimony elicited from this witness since he was last called to the witness stand, and bearing generally upon the question of so-called interstate traffic.

The motion is granted as far as the testimony goes to the phase of interstate traffic.

Whereupon the defendant duly excepted.

The plaintiff moves to strike out the balance of the testimony, for the reason it is immaterial, incompetent and irrelevant, and now moves to strike it out.

The motion is granted.

Whereupon the defendant duly excepted."

(Transcript pp. 236 to 238.)

ARGUMENT.

But one question is presented by this record, and that is the following:

Was William H. Gray, under the Evidence Admitted, and the Evidence Excluded, Employed in Interstate Commerce?

Restating the material facts, they are as follows:

First: The Railway Company, at the time and place, was engaged in Interstate Commerce.

Second: The engines dispatched at the roundhouse at Antigo hauled trains to Ashland through Michigan and also to the Waters-

meet branch in Michigan; hauled trains bound to and from Chicago, some of which contained refrigerator cars and interstate freight; no proof that *all* engines at *all times* handled interstate freight.

Third: The duties of Gray and his assistants were to take engines coming in off the road, dump their cinders in the cinder pit, fill them with coal and water and kindling, and then house them in the roundhouse; *keep the cinders shoveled out of the cinder pit; keep the cinders wet down with water and free from fire so as not to destroy the rails and ties over the cinder pit and endanger the engines; to exercise authority and jurisdiction over the cinder pit man; to look after, watch, guard and protect the cinder pit.*

Fourth: On the morning in question the accumulation of hot cinders had endangered the cinder pit. Gray gave orders that they be wet down and cooled off; while waiting for another engine to arrive which he could dispatch *he went to the cinder pit to observe the condition thereof and see whether his orders were being carried out, and when returning therefrom to his shanty to wait for another engine to be dispatched he received the injury in question.*

The "employment" of Gray has two aspects:

First: He must clean, coal, water and house *both* state and interstate engines. From necessity each engine must be handled separately.

Second: He must maintain, watch over and keep in condition the cinder pit and the ties and rails thereover; he must keep the cinders shoveled out of the cinder pit, keep them wetted down and cooled, so the heat and fire will not destroy the rails and the steel ties. Otherwise, his engines while being cleaned, may fall into the pit.

We submit that his employment, in its second aspect, does not differ in any respect from the employment of the bridge repairer, or the section man, who is repairing or maintaining that part of the permanent system of the railroad which is devoted to intrastate and interstate commerce.

Within the rule of the Pederson case, 229 U. S., 146, Gray was employed, while performing these duties, in interstate commerce.

While the citation of this case should be deemed sufficient, yet we desire to call the court's attention to applications of the rule, and principle thereof, by other and inferior tribunals.

In *Barlow vs. Lehigh Railway Company*, 143 N. Y. Supp., 1053, where an employe was switching coal, which was to be used by both state and interstate engines indiscriminately, it was held that he was employed in interstate commerce.

So the unloading of oil intended to be used as fuel for state and interstate engines constitutes interstate employment.

Montgomery Southern Pacific Railway Company, 131 Pac., 507.

Where a pumper who pumped water in tanks, from which state and interstate engines drew their water, was injured, while riding on his hand car to work, his employment was held to be interstate.

Horton vs. Oregon Navigation Company, 130 Pac., 897.

The wheeling of coal to be used for a repair shop where state and interstate engines were repaired constitutes interstate employment.

Cousins vs. Illinois Central Railway Company, 148 N. W., p. 58.

In the Merkl Case, 198 Fed., 1, (C. C. A.) the employe was engaged in repairing a refrigerator car which was indiscriminately used in both kinds of service, sometimes in one and sometimes in the other.

Held that he was employed in interstate commerce.

Also *Missouri K. & T. Ry. vs. Demahy Co.*, 165 S. W., 529; *Winters vs. Minneapolis & St. L. R. Co.*, 148 N. W., 106.

Thus it seems clear that if Gray had been injured *while standing at the cinder pit, and actually engaged in supervising the wetting down of the cinders*, there could be no question but that he was then employed in interstate commerce. It matters not, under the authorities as we read them, that at the moment of injury he was *walking to or from his place of employment.*

North Carolina Railway Company vs. Zachary, 232 U. S., 248.
St. Louis, San Francisco & T. Ry. Co. vs. Seale, 229 U. S., 156.

I. C. R. Co. vs. Nelson, 203 Fed., 951 (C. C. A.);
Lamphere Case, 196 Fed., 336;
Rentz Case, 162 S. W., 959;
San Pedro Railway Co. vs. Davide, 210 Fed., 870 (C. C. A.);
St. Louis & Southwestern Railway Company vs. Brothers, 165 S. W., 488;
Sanders vs. Charleston Railway Company, 81 S. E., 283.

I further submit that his employment, in its first aspect, constitutes interstate employment. At the moment of his injury he was returning to his rest shanty, where he would await the arrival of another engine. It was not shown, and then probably could not be known, whether such engine would be one hauling interstate freight or intrastate freight. He would not only handle that engine, but all others that would come after it later in the day. This was early in the day.

As stated by the Wisconsin Supreme Court in its opinion (Transcript p. 287), about thirty engines were dispatched each twenty-four hours. While going to such work, or waiting for it, his employment was as much interstate commerce as if it were definitely ascertained that the very next engine would be an interstate engine. It was his duty then to await and dispatch all of the engines then out on the road running towards Antigo, both state and interstate. It seems ridiculous to argue that the character of his employment during the period of waiting must be determined by the merest chance that the next arriving engine is either an intrastate or an interstate engine. It is likewise ridiculous to argue that the character of his employment is changed because of the fact that these engines arrived singly rather than in numbers, constituting a train.

We submit that the case is identical with the situation in
St. Louis, San Francisco & T. Ry. Co. vs. Seale, 229 U. S., 156.

There a car checker was going through the yards to a place where he was to await the arrival of a train which would bring both state and interstate cars. It was his duty to examine the cars, make a record of the numbers and initials, and to inspect and make a record of the seals on the car doors. Of course, he had to handle each car separately. It might well have been argued in that case that because

he had to handle each car separately he was not, while approaching his work, engaged in interstate commerce.

This court, however, held, as stated in the syllabus:

"An employe, whose duty is to take numbers of and seal up and label cars, some of which are engaged in interstate and some in intrastate traffic is directly, and not indirectly, engaged in interstate commerce."

I submit that the mere fact that these mixed cars arrived in a single train is wholly immaterial. Thus we conclude that in both of its aspects Gray's employment was interstate.

It may be profitable to discuss the opinion of the State Supreme Court. That case was argued April 30th and decided May 31st, 1913. Both the Pederson and the Seale cases, supra, were decided May 26, 1913, only five days before the decision in this case, and these decisions were not then published or known.

At that time the law was in a state of great uncertainty. But little had been said by this court on the question as to what constituted interstate employment. The State Courts were groping around trying to find the light. Just previous to the decision in this case the Wisconsin Supreme Court had decided the case of Ruck vs. C. M. & St. Paul Railway Company, 153 Wis., 158, wherein it held that a mechanic, who was injured while engaged in repairing a wrecker outfit, which outfit at times was used in both intrastate and interstate commerce, was not employed in interstate commerce.

The case did not go on the proposition that the wrecker outfit was alternately used for both kinds of commerce, but went on the point that work in making repairs on mere appliances or premises was too remote from the actual moving of interstate commerce to constitute employment therein. From the cases above cited it now seems obvious that this was an erroneous deduction.

In addition to the cases already cited see the following cases on the question of repairing appliances and premises used in interstate commerce.

Gaines vs. Detroit Railway Company, 148 N. W., 397.
Freeman, Receiver vs. Powell, 144 S. W., 1033.
Zachary Case, 232 U. S., 248.
Eng vs. Southern Pacific, 210 Fed., 92.
Armbruster Case, 147 N. W., 338.

In the latter case it is held that the coaling of an engine to go out on an interstate trip constitutes interstate employment.

Most, if not all of these cases, draw their inspiration and application from the Pederson and Seale cases, and it is now clearly apparent that the Ruck case was wrongfully decided by the Wisconsin Supreme Court.

In Graber vs. Duluth, South Shore & Atlantic Ry., 150 N. W., p. 489, decided Jan. 12, 1915, the Wisconsin Supreme Court cited the Pederson, Zachary and Behrens (233 U. S., 473) Cases.

There a brakeman arrived at the terminal on an interstate train, finished up his train work, went from the Railroad Company premises to get a drink of liquor, and was injured while crossing the railroad yards to go to the depot to meet his conductor and ascertain if there were any further orders, and the court held that at the time of the injury he was engaged in interstate commerce. This case should be read to understand the new view of the law taken by the Wisconsin Supreme Court.

Starting with the false premises adopted by it in the Ruck case, the Wisconsin Supreme Court makes its first proposition (Transcript p. 291), to-wit:

"Taking care of an engine after it has completed its run, and preparing it for the roundhouse, seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply preparing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce."

The Court then proceeds to its next premise, which we see from the above authorities is likewise false. This is, that one, while awaiting the arrival of other engines which may be state or interstate, cannot be said to be "employed in interstate commerce" during the hours of his *leisure.*

The court concludes as follows:

"The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish the fact that the plaintiff's *entire work* consisted of dispatching engines engaged in interstate commerce."

(Transcript, p. 291.)

It should be specially noted that the Wisconsin Supreme Court did not fully state the facts in relation to, or discuss, what we have herein called the "second aspect" of Gray's employment. It probably considered this immaterial because of the view of the first premise, to-wit, the dispatching of an engine was like repairing it and, therefore, the maintenance and repairs of the cinder pit and track thereover were of the same character.

In Colasurdo vs. Central Railway Company, 180 Fed., 832; affirmed, 192 Fed., 901 (C. C. A.), followed and approved in *Horton vs. Oregon Navigation Company,* 130 Pac., 897, the Court, in referring to the Federal Employers' Liability Act, and the construction placed thereon by this court, well said:

"The Act meant to include everybody whom Congress *could* include."

It seems to us that this is the true test. The question then is, can it be held, by any reasonable construction, that Gray's employment was interstate. It is almost a matter of common knowledge that on the main lines of the great interstate railroads, like the Chicago and North Western Railroad, the great bulk of the business is interstate. The Products of the forest, the factory and the farm must be carried into the great interstate markets. The return trips of the cars must bring in the manufactured products of the great industrial centers, the meats, the oils, clothing, boots and shoes, coffees, teas and refrigerated foods. It was Gray's duty to handle every engine (during his portion of the day) that hauled all this great bulk of commerce. He must maintain his appliances, his bars and picks and rods, his cinder pit, his track and premises so as to carry on this work. The employment is single and entire. When he is going to the premises in the morning and returning at night he is approaching and returning from one employment, not two. It is unreasonable to say or to hold that because by chance some engine may haul a passenger train on which there is no interstate passenger, or a freight train on which there is no interstate shipment, therefore, while waiting between the arrival of trains he is not engaged in interstate commerce. *Rducing the argument to an absurdity, it must likewise follow that while waiting he is not employed in intrastate commerce.*

Therefore, we submit that in both of its aspects Gray's employment was interstate, and the Wisconsin Supreme Court erred in its holding to the contrary.

EDWARD M. SMART,

Solicitor and Counsel for Plaintiff in Error,
Chicago and North Western Railway Company.

Service of the foregoing brief is hereby accepted and delivery o
a copy thereof is hereby acknowledged this.....day o
March, A. D. 1915.

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Attorney for Plaintiff in Error.

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Attorney for Defendant in Error.

SUBJECT INDEX.

INDEX OF CASES.

In Supreme Court of the United States

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

WILLIAM H. GRAY,

Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

Is this Court without jurisdiction because the writ of error is signed "F. W. Oakley, Clerk of the District Court of the United States for the Western District of Wisconsin, by Fred W. French, Deputy."

The learned counsel for the defendant in error makes the point that this court has not acquired jurisdiction because a writ of error must be signed by the clerk personally, and cannot be signed by his deputy in his behalf.

Section 623 United States Compiled Statutes provides for the appointment, in the Western District of Wisconsin, of a clerk of the Circuit and District Courts. *Section 624* of said statutes provides that one or more deputies of any clerk of a Circuit Court may be appointed by such court on the application of the clerk, etc.

No limitation is placed by said sections upon the powers and duties of such a deputy, nor are they in any manner specified.

In the absence of any statutory provision or implication to the

contrary a deputy clerk is authorized to perform any official ministerial act that may be done by his principal.

Cyc. Vol 7, page 248.

The fact that a warrant, citation and monition in the District Court was not signed by the clerk of the court was held unimportant, it having been attested by the judge, sealed with the seal of the court and signed by the deputy clerk. The court said, "an act of Congress authorized the employment of the deputy and in general a deputy of a ministerial officer can do any act which his principal might do."

The Confiscation Cases, 87 U. S. 92, 111.

In Garneau vs. Dozier, 100 U. S. 7, the court held that a transcript of the record was sufficiently authenticated for the purposes of a writ of error where it was signed by the deputy in the name and for the clerk of the court to which the writ of error was directed.

In Bryan vs. Ker, 222 U. S. 107, 113, in which process for the detention of a vessel bore the purported signature of the deputy clerk, which was not in fact his own but was affixed by his brother under an attempted but ineffectual delegation of authority, but the writ was in the usual form, was issued from the office of the clerk and bore the seal of the court as evidence of its authenticity, the court held that this irregularity did not render the writ void but merely voidable, for it could have been amended by substituting the true for the purported signature of the deputy.

Section 1004 United States Compiled Statutes provides that writs of error returnable to the Supreme Court may be issued as well by the Clerks of the Circuit and District Courts under the seals thereof as by the Clerk of the Supreme Court.

Section 1005 of said statutes provides that the Supreme Court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of a writ of error when there is a mistake in the *teste* of the writ or a seal to the writ is wanting, or when the writ is made returnable on a day other than a day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to

the accompanying record, and in all other particulars of form, provided the defect has not prejudiced, and the amendment will not injure, the defendant in error.

Where a writ of error was signed by the clerk of the Court of Criminal Appeals of Texas, instead of by the clerk of the Supreme Court of the United States, or of the Circuit Court of the United States for the proper district, such error was held amendable under *Section 1005*, which provides that the Supreme Court may allow an amendment of a writ of error in all particulars of form.

Miller vs. Texas, 153 U. S., 535.

Even where the writ of error bore the *teste* of the Chief Justice of the Supreme Court of Texas, was signed by the Chief Justice and the Clerk and sealed with the seal of that court, it was held that all such defects came within the remedial provisions of the statute and that the seal and signature of the clerk of the Supreme Court of the United States might be affixed to the writ.

Texas & Pacific R. R. Co. vs. Kirk, 111 U. S. 486.

It would also appear that the entry of a general appearance would cure a defective writ of error.

McDonogh vs. Millaudon, 44 U. S. 693, 707.

In the above case the defect complained of was that the clerk of the State Court issued the writ and the court said:

"If errors had been assigned by the plaintiff here, and joined by the defendant, no motion to dismiss for such a cause could be heard; and as no formal errors are usually assigned in this court, and none were assigned in this cause, we think the delay to make the motion is equal to a joinder in error, even if the clerk of the Supreme Court of Louisiana had no authority to issue the writ."

Section 1005 of the Compiled Statutes of the United States referred to above was passed June 1st, 1872, and the cases of *Hodge vs. Williams*, 22 How. 87, and *Carroll vs. Dorsey*, 20 How. 204, wherein the Supreme Court discussed the power to amend the writ of error, were decided prior to the adoption of said section.

It seems reasonably clear from the foregoing that the writ was properly signed, but if not, and the defendant in error is now in

position to raise any objection on that account, the Supreme Court instead of dismissing the writ would merely authorize its own clerk to sign and seal such writ.

II.

Defective Assignments and Specifications of Error.

The learned counsel for the defendant in error urges this court to affirm the judgment, on the ground that our assignments and specifications of error do not comply with the statute and rules of this court. He claims that the questions involved are raised by alleged error in the "rejection of testimony," and that we have failed both in the Assignment of Errors and in the Specification of Errors, to set forth "the full substance of the evidence rejected."

As to our failure to comply with this rule as to Specification of Error in the brief, we beg to call the court's attention to the fact that immediately upon this point being called to our notice we reprinted our briefs, and have served and filed the same with this court as an "Amended Brief of Plaintiff in Error". This brief was served March 1, 1915, and we expect that it will have been timely served within the rules. In such amended brief, and by the "fourth" specification of error found on pages 11 and 12, it will appear that we now have complied with the rules of this court so far as such rules apply to briefs.

As to the Assignment of Errors filed with our petition for the Writ of Error, we have served notice of a motion for leave to amend such assignment of errors, and added an additional assignment in the same language as was set forth in our fourth Specification of Error.

This motion has been set for hearing before this court on the 22d day of March, 1915, or in case the cause shall be called for argument prior thereto, then at the time this cause is called for argument. In such motion papers we have set up the facts and shown the reasons and causes for the failure to incorporate this Assignment of Errors in the original Assignment of Errors. We refer to said motion papers, and respectfully submit to this court that the amendment should be allowed. It would seem clear that it is within the power and discretion of the court to allow an amendment of an

Assignment of Errors under the circumstances, where no injustice will be done to the defendant in error, and where, if the amendment were not allowed, substantial injustice would be done to the plaintiff in error.

2 Encyclopedia Pleading and Practice, 920.
Ackley vs. Hall, 106 U. S., 428.
Bunyan vs. Loftus, 57 N. W., 685.
Hall vs. Railway, 84 Ia., 311.
Hubbard vs. Garner, 73 N. W., 390.

We call the court's attention to the fact that, notwithstanding the learned counsel for the defendant in error has suggested this point, yet it fully appears from his brief, and also from our briefs, that the questions have been fully argued and discussed, and the testimony rejected has now been set forth before this court in compliance with the rule.

As we understand it, the object of the rule with reference to Specification of Errors in *briefs* is to properly inform this court and opposing counsel as to the exact question raised and the error alleged. This has been accomplished by the amended brief. It seems to us that the main object of the Assignment of Errors is to submit and present to the judge allowing the Writ of Error a statement showing errors claimed, and thereby enabling him to determine whether the Writ of Error shall be allowed. Completeness and adequacy of Assignment of Errors are necessarily important in cases where the petition is presented to a judge of the reviewing court, because such judge has no knowledge of the proceedings in the lower court, excepting as he may gain the same from an inspection of the record, and it is not contemplated that he shall be required to make such inspection, but the Assignment of Errors shall furnish such information.

In the present instance the Writ of Error was allowed by the Honorable John B. Winslow, Chief Justice of the Supreme Court of the State of Wisconsin. (Transcript of Record p. 3.) Mr. Justice Winslow was the Justice who wrote the opinion of the Supreme Court of the State of Wisconsin, and was necessarily entirely familiar with the questions involved, as they are fully discussed in his opinion. (Transcript pages 289 to 293.)

For these reasons, and because of the excuses given for failure

to make proper assignment originally, (all as set forth in the motion to amend) we submit that in the proper exercise of discretion this court should permit such amendment.

Even if there has been no proper Assignment of Errors, and this court is without power to permit such amendment, we submit this is a case where the court should, at its option, notice a "plain error" not assigned according to Rule 21, Subdivision 4 of the rules of this court.

That this court will follow this course in a proper case is amply indicated by its decisions.

Columbia Heights Railway Company vs. Rudolph, 217 U. S. 547, and Citations.

A court should notice an unassigned error where it is "controlling."

C. R. I. & P. Ry. Co. vs. Barrett, 190 Fed., 118.

Where the question raised by the unassigned error lies at the *threshold* of the case, and is involved *in errors already assigned,* then the court should, in the exercise of proper discretion, consider the unassigned error.

United States vs. Bernays, 158 Fed., 792.

Even though an Assignment of Error is not sufficient under the rules, yet where it *underlies other questions assigned,* then the court should notice such error.

Andrews vs. National Foundry Co., 77 Fed., 774.

Non-compliance as to Assignment of Errors will be disregarded where the merits are fully considered by the Court below and discussed by the briefs in the reviewing court.

Flagler vs. Kidd, 78 Fed., 341.

Where there is no motion to affirm because of no Assignment of Error, and before the hearing in the reviewing court appellant

amends his brief, supplying proper Specification of Error, the court will not affirm.

Nivens vs. Nivens, 4 Indian Territory, 30.
Roberts vs. Parker, 90 N. W., 744.

In the case at bar the question raised on the ruling as to rejection of the evidence is controling, and underlies all other questions within the rules of the decisions above stated. While it is true that the question arises in the form of a ruling on the striking out of evidence, yet it will appear from the opinion of the Supreme Court that the court took into consideration the evidence stricken out as well as the evidence admitted, and decided on the whole of such evidence, and determined thereon the issue and question here raised. The Assignment of Errors which we did make (Transcript pages 2 and 3) fully sets forth the question really raised, and the additional assignment which it is claimed we should have made, and which we have sought to add by an amendment, is merely an elaboration, and the setting forth of the same in compliance with the rule.

We respectfully submit that in a case of this kind, where the failure to assign errors has arisen because of inadvertence and inexperience, and it conclusively appears that no prejudice has resulted, it would not be in full accord with the spirit of the times, which calls for the waiving aside of technicalities in order to do substantial justice.

III.

Federal Question.

The learned counsel for ~~plaintiff~~ defendant in error argues that there is no Federal question involved and, therefore, this court has no jurisdiction, and the judgment should be affirmed.

As we understand his argument, it proceeds thus:

(a) The negligence charged against the defendant is that of fellow servant.

(b) The defendant is liable for the negligence of a fellow servant equally under the State and Federal law.

(c) The only substantial difference between the two laws is that under the *State* law contributory negligence may be a defense, while under the *Federal* law it only goes in diminution of damages.

(d) The jury found the plaintiff was *not guilty of contributory negligence.*

(e) Because the jury found there was no contributory negligence, the Wisconsin Supreme Court *might* have based its decision on the point that it was *immaterial* under which law the case was tried, and, therefore, any error in failure to try the case under the Federal law was harmless and unprejudicial.

(f) Thus, there being two grounds upon which the Supreme Court of Wisconsin *might* have decided the case, to-wit, one under the general law and one involving a Federal question, this court is thereby precluded from reviewing the decision on the Federal question. (Brief of Defendant in Error, pages 17 to 29.)

Restated, the point is that even though the Supreme Court of Wisconsin passed on and decided the Federal question, yet it *might* have held that the error of the trial court was harmless and non-prejudicial. Therefore, this court should refuse to decide the Federal question, and should affirm the judgment.

We recognize that it is established by a long line of authorities in this court that if the decision of a state court is *actually* based on two questions, one the Federal question, and one the non-Federal question, this court will not review the federal question.

(See cases cited in Brief of Defendant in Error, page 26.)

Here the situation is different. The state court did *not* hold or decide that any error committed by the trial court was harmless, but *assumed* that any such error (if there was such) would have been *harmful,* and therefore passed to and decided the Federal question.

In *St. Louis & Iron Mountain Railway Co. vs. McWhirter, 229 U. S., 265,* the complaint presented two distinct causes of action, one at common law and the other under the Federal Employers' Liability Act, involving the hours of service law. The state court permitted the case to go to the jury, on the theory that the defendant was negligent because the plaintiff was employed longer than was lawful under the hours of service law.

In this court it was sought to sustain the judgment, on the ground that there was another common law ground of negligence, to-wit, the negligence of the engineer. This court reversed the judgment, and disposed of this question in the following language:

"If, as is inferable from the argument, reliance is placed on the ruling of the court below that there was evidence tending to show negligence on the part of the engineer for the purpose of establishing that even if a Federal question was passed upon the case was also decided on an independent non-Federal ground broad enough to sustain the judgment, the proposition is without merit. The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone, affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of concluding that because there was a *potentiality* of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect. But it was long since pointed out in Neilson vs. Lagow, 12 How. 98, the court speaking through Mr. Justice Curtis, that to admit that the authority to review the action of a state court where it has decided a Federal question can be rendered unavailing by a suggestion that the court below *may* have rested its judgment on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion."

In Henderson Bridge Company vs. Henderson City, 173 U. S., 592 two questions were put up to the state court, to-wit:

(a) The common law question of *res adjudicata;* and

(b) The Federal question.

The State Appellate Court expressly waived and passed by the question of *res adjudicata*, and decided the Federal question.

On Error to this court it was sought to sustain the judgment of the State court, on the ground that the state court *might* have based its decision on the question of *res judicata* and, therefore, there was no Federal question involved.

This court disposed of this question in the following language:

"If the state court had sustained the city's plea of *res judicata* upon some ground that did not necessarily involve the determination of a Federal right, it might be that the present case would come

within the rule, often acted upon, that this court in reviewing the final judgment of the highest court of a State will not pass upon a Federal question, however distinctly presented by the pleadings, if the judgment of the state court was based upon some ground of local or general law manifestly broad enough in itself to sustain the decision independently of any view that might be taken of such Federal question. But that rule cannot be applied to the judgment below. Upon examining the opinion of the Court of Appeals of Kentucky in this case we find that that court expressly *waived* any decision upon the plea of *res judicata* for the reason that some views were then pressed upon its attention that had not been presented in previous cases, and it reconsidered and discussed the main question suggested by the defence, namely, that the Constitution of the United States forbade the assessment of that part of the bridge property between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio River. This court therefore has jurisdiction to review the final judgment of the state court for the purpose of ascertaining whether it deprived the defendants of any right, privilege or immunity specially set up by them under that instrument."

At this point we wish to call the court's special attention to the Henderson Bridge case, as it seems almost parallel to the case at bar. In the case at bar the Wisconsin Supreme Court *might* have held that because the jury found the plaintiff not guilty of contributory negligence it was immaterial under which law the case was tried and, therefore, refused to have passed on the Federal question. However, in the Henderson case, the court *waived* (impliedly) the first question and passed to and decided the Federal question. Perhaps we are admitting too much when we say that the Wisconsin Court waived the first question. We think the better reasoning leads to the conclusion that the Wisconsin Supreme Court *impliedly held that if there was any error it would be prejudicial.*

Counsel cite and quote from the case of *Kennebec Railroad Company vs. Portland Railroad Company*, 14 Wallace, page 23, as holding that there is no Federal question where the decree of the state court *could* rest on a non-Federal question. The Federal question involved was as to whether or not the statute of 1857 impaired the obligation of a contract.

This court says:

"But a full examination of the opinion shows that if judgment was based upon the ground that the foreclosure was valid, *without reference to the statute of 1857*, of course the method pursued was in strict conformity to the mode of foreclosure authorized when the contract was made by the laws then in existence."

If counsel had read this opinion carefully, he would have discovered that this case is in line with the general rule.

We submit that where the state court *waives a possible non-Federal question,* or *impliedly decides* against the defendant in error on the non-Federal question, and passes to and decides the Federal question, this court has jurisdiction to review the Federal question, and, if erroneously decided, should reverse the state court.

IV.

Harmless Error.

Is it harmless error to try a case under the State Law when the sole liability is under the Federal Law?

Fearful that this court may hold that, under the evidence received and rejected, Gray was employed in interstate commerce, counsel spends a great deal of time in an effort to demonstrate to this court that any error of the state court in holding to the contrary was harmless and immaterial. We now address ourselves to this proposition.

We will now assume that this court will hold that the state court committed *error.* We are first concerned in determining what the *presumptions* are as to whether error is harmful, and also what the chances are that the error *may in fact* have been harmful.

In *2 Encyclopedia of United States Supreme Court Reports,* page 347, we find the following rule:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it is committed, it is well settled that a reversal will be directed unless it appears, *beyond doubt* that the error complained of did not

and *could not* have prejudiced the rights of the party. In other words, error is *presumed to be prejudicial*. unless the contrary is shown, and errors cannot be said to be immaterial where it does not appear, *beyond doubt*, that they were errors which *could not* prejudice the rights of the plaintiff."

In *Boston & Albany Railroad Company vs. O'Reilly*, 158 U. S., 334, this court used the following language, to-wit: .

"* * * While an Appellate Court will not disturb a judgment for an immaterial error, yet it should appear *beyond a doubt* that the error complained of did not and *could not* have prejudiced the rights of the party duly objecting."

In *Mexia vs. Oliver*, 148 U. S., 664, page 673, it is said:

"We cannot say that these errors were immaterial, as it does not appear *beyond doubt* that they were errors which *could not* prejudice the rights of the plaintiff."

In a case as late as *Crawford vs. United States*, 212 U. S., 183, the court said on page 203:

"There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is *clearly shown* from the record that the commission of such an error against a party seeking to review it, is no cause for a reversal of the judgment."

See also particularly the case of

Wilmington vs. Fulton, 205 U. S., 60.

The parent cases upon which this rule is founded are:

Deery vs. Cray, 5 Wallace, 795, 807.
Smith vs. Shoemaker, 17 Wallace, 630.

In the Deery case the following language is used:

"* * * It must appear *so clear as to be beyond doubt* that the error did not and *could not* have prejudiced the party's rights."

In addition to the presumption that the error was prejudicial, we have a further presumption that both the trial court and the Wis-

consin Supreme Court have *held that it was prejudicial.* It is a familiar rule in all appellate courts that the reviewing tribunal will not decide unnecessary questions. It must be presumed that the Wisconsin Supreme Court considered two questions, to-wit:

(a) Was error committed?

(b) Was it prejudicial?

If the court could have said, as counsel now contend, that the error was harmless it would have, undoubtedly, taken that as the principal ground of decision. Because it passed by in silence any such possible ground of decision, and proceeded to consider the merits of the proposition, we must here conclude that the Wisconsin Supreme Court was itself of the opinion that an error of this kind was harmful. This being the *presumption* in the case, we submit that this court should not overrule the implied holding of the Wisconsin Supreme Court in this respect. Defendant in error has taken no cross-appeal, and is in no position now to contend that any holding of the Wisconsin Supreme Court to the effect that the error was prejudicial, is erroneous.

Therefore, we conclude, at the outset of the consideration of this question, that two things are true, to-wit:

(a) The error is presumed to be harmful;

(b) The Wisconsin Supreme Court impliedly held that it was harmful.

Assuming that we are wrong on the two foregoing contentions, there remains to be considered the question as to whether or not, on looking into this record, this court can say that it appears *"beyond a doubt* that the error complained of did not and *could not* have prejudiced the rights of the party duly objecting."

Counsel for defendant in error has added an appendix to his brief, containing both the Federal Employers' Liability Act and the Wisconsin Railway Employers' Liability Act.

(See Brief 74-80.)

The copies of brief served on us show that these two acts have been intermingled in alternate pages so that there is some confusion.

Because thereof we have reprinted the Wisconsin Act as an appendix to this brief.

The following points involved in this law should be noted:

(1) The opening paragraph creates liability "subject to the provisions hereinafter contained regarding contributory negligence";

(2) Sub-paragraph 2 makes the company liable for negligence of a fellow servant, where the injury is caused *"in whole or in greater part* by the negligence of any other officer, agent, servant or employe;"

(3) Sub-paragraph 3 makes it *mandatory* to submit the issues to the jury by a *special verdict;*

(4) Sub-paragraph 4 provides that where the negligence of a fellow servant "was greater than the negligence of the employe so injured, and *contributed in a greater degree* to such injury" then the plaintiff may recover, and contributory negligence will be no bar.

(5) Sub-paragraph 5 provides that all questions of negligence and contributory negligence *shall be for the jury.*

(6) There is no provision whereby contributory negligence diminishes the damages.

(7) There is no provision (like Section 4 in the Federal Employers' Liability Act) recognizing that assumption of risk shall be a defense, except where there is a violation of the statute for the safety of employes.

(8) There is no provision (like Section 5 of the Federal Employers' Liability Act) whereby any sum paid by the carrier to any insurance, relief benefit or indemnity, may be set off against any damages on account of the injury.

We desire to point out the various things which could be prejudicial to the plaintiff in error where a trial was had under the State Act instead of under the Federal Act, to-wit:

First: SPECIAL VERDICT:

Under sub-section 3 of the Wisconsin Act aforesaid it is *mandatory* upon the court to submit a special verdict. If this case were

tried under the Federal Act, the court would follow the statute which applied in ordinary cases.

Section 2858 of the Wisconsin Statutes of 1911 reads as follows:

"The court, in its discretion, may, and when either party, before the introduction of any testimony in his behalf, shall so request, the court shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions, in writing, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular questions of fact, to be stated as aforesaid. In every action for the recovery of money only or specific real property the jury may, in their discretion, when not otherwise directed by the court, render a general or a special verdict."

It appears from this statute that in cases not coming under the Wisconsin Railway Law a special verdict is only mandatory where one party requests it before the introduction of any testimony. Thus we see that in the case at bar a special verdict was *compulsory*, whereas if it had been tried under the Federal Act it was not compulsory unless requested by either party.

Second: WISCONSIN RULE AS TO ORDINARY CARE:

Being tried under the State law the Wisconsin Court, of course, followed its own definition of "ordinary care". If it had tried the case under the Federal law it would be the duty of the court to have adopted the rule of the definition of "ordinary care", as it has been defined by the Federal Courts.

In the Nitro-Glycerine case, 15 Wallace, 524, it is said in the syllabus:

"The measure of care against accidents which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use *if his own interests were to be affected, and the whole risk were his own.*"

In Hennessey vs. C. & N. W. Ry. Co., 99 Wis., 109, page 118, it is held:

"The definition of ordinary care as 'such care as the ordinary

person uses in the transaction of the *ordinary affairs of life'* is certainly inaccurate, if not positively erroneous."

Third: PROXIMATE CAUSE:

In Wisconsin it has been repeatedly held that it is error unless the trial court defines "proximate cause" in substantially the following language:

"The efficient cause, that which acts first and produces the injury as a natural and probable result, under such circumstances that he who is responsible for such cause, as a person of ordinary intelligence and prudence, ought reasonably to foresee that a personal injury to another may probably follow from such person's conduct. It is not necessarily the immediate, near, or nearest cause, but the one that acts first, whether immediate to the injury or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events, so united to each other by a close causal connection as to form a natural whole, reaching from the first or producing cause to the final result."

Deisenrieter vs. The Kraus-Merkel Malting Co., 97 Wis., 279, 288.

This definition was adopted by the trial court. (Trans. of Rec. page 258.)

Many courts have refused to follow the Wisconsin Court in this definition. As to whether the Federal courts would or should adopt this definition we are unable to say.

Fourth: ASSUMPTION OF RISK:

In *Seaboard Air Line Co.*, 233 U. S., 492, this court points out and analyzes the clear distinction between "contributory nogligence" and "assumption of risk".

In Wisconsin it is held as follows:

"This court has held that assumption of risk *is a form of contributory negligence;* hence a negative answer to the general question covering contributory negligence logically *includes also assumption of risk,* in the absence of a special question as to that special phase of contributory negligence."

Johnson vs. Coal Company, 126 Wis., 492, page 501.

In Koepcke vs. Wisconsin B. & I. Co., 116 Wis., 92, page 95, it is said:

"By a long line of cases it has become settled here that so-called assumption of risk is but a phase of contributory negligence."

In *Seaboard Air Line Company vs. Horton, supra,* this court held assumption of risk was a complete defense under the Federal Employers' Liability Act.

At the time the case at bar was tried it was not believed, and it had not been held by the Wisconsin Supreme Court, that assumption of risk was a defense under the Wisconsin Railway Act. The lawyers in Wisconsin had in mind the decisions of the court holding that assumption of risk was but a form of contributory negligence and, therefore, it was believed by the railroad lawyers that the Wisconsin Railway Act did not permit it being distinguished from *the contributory negligence referred to in the law.* As we have noted above, the Wisconsin Act did not impliedly recognize that assumption of risk was a defense, (except where there was a violation of a law for the safety of employes), as is done in Section 4 of the Federal Employers' Liability Act. Notwithstanding it was believed that assumption of risk was not a defense under the Wisconsin law, yet counsel for the Railway Company, out of an abundance of caution, requested two questions in the special verdict which presented this issue. (See questions 11 and 12, Trans. of Record, page 269.) These were marked "refused except as given" (Transcript page 269), and by examination of the special verdict (Transcript pages 269 and 270) we note that this issue was not submitted.

If the case had been tried under the Federal Act, then under the rule of the Seaboard Air Line case this issue should have been submitted to the jury. Counsel is evidently fearful that the question of assumption of risk should have been submitted to the jury, because on pages 21 and 22 he argues that there was no evidence to sustain a finding of assumption of risk, and cites the case of Y. & M. V. Ry. Co. vs. Wright, 35 Supreme Court Reporter, 130, (decided Jan. 15, 1915) as holding that it would appear as a matter of law that there was no assumption of risk.

This case is without application. The facts are entirely distinguishable from the case at bar. We presume that it is out of place to attempt to demonstrate to a conclusion that Gray was guilty of assumption of risk as a matter of law. We desire, however, for the purpose of showing that the railway company *may* have been prejudiced to call attention briefly to the plaintiff's own testimony. The jury found that the Railroad Company was negligent, because Kane, the engineer (a) ran the engine north of the cinder pit; (b) Because Kane failed to ring the bell. Ordinarily one servant does not assume the risk of the negligent acts of another servant. We submit, however, that where an employe knowingly and voluntarily submits himself to the risk of being injured by a careless servant, whose common course of conduct is familiar to him, he thereby assumes the risk of being injured by his careless acts.

On the question of assumption of risk, we desire to call the court's attention to the following pages of the transcript of the record, to-wit: 113, 139, 148. From this record it appears that Gray walked seventy feet through the smoke and steam in a space alongside of the track within striking distance of an engine, knowing that engineers *commonly* ran their engines north of the cinder pit *without any signals.* On page 148 of the transcript he says that it was "a common occurrence for an engine to move along in there without giving the proper signals." He thought an engine might come there at that time, and that is why he stopped and listened. (Transcript page 113.) The finding of the jury that he was not guilty of contributory negligence does not dispose of the question. That simply means that in walking in this place in the steam and smoke, and in stopping and listening, he exercised the care of an ordinary person; it does not mean, however, that he did not know and appreciate and understand the risk of engine men running in this improper place at any time without signals.

For these reasons we submit that it was at least ***for the jury*** to determine the question of assumption of risk; that if the case had been tried under the Federal Act this would have been a defense, and we would have had a right to have it submitted, independent of the question of contributory negligence, ***which was refused us on the trial.***

Fifth: CONTRIBUTORY NEGLIGENCE:

Counsel lays great stress on the point that because the jury found the defendant not guilty of contributory negligence, therefore, the railroad company is not harmed by the case being tried under the wrong statute.

We submit that this conclusion does not follow at all. The following are very good reasons therefor, to-wit:

(a) If the case had been tried under the Federal law it would have been the duty of the court to have expressly told the jury that if they found Gray guilty of contributory negligence then they should apportion the damage according to the negligence of the respective parties, and it would have told them that contributory negligence did not operate as a complete defense.

(b) In a trial under the state law no instruction is given to the jury. The jury is *presumed to know* that contributory negligence is a complete defense if it is less than the negligence of the defendant. Not only is there this presumption, but as a matter of common practice attorneys in arguments give the juries to understand completely that a finding of contributory negligence may defeat the plaintiff. As there is nothing in this record to indicate the fact, we are not at liberty to state to the court as to whether or not one of the counsel for Mr. Gray directly told the jury what would be the effect of contributory negligence. Yet, we request counsel to frankly state to the court what the fact is.

Under the state practice the Wisconsin Supreme Court, in the case of Guse P. & M. M. Co., 151 Wis., 400, has held that it is not improper for counsel to state directly to the jury how they should answer respective questions. Can it be said, as a matter of law, that under these circumstances the jury would have found freedom from contributory negligence "beyond a doubt" if the case had been tried under the Federal law? It may be correct to *theorize* that the same jury, on the same facts, would have made the same finding, *regardless of the effect of their answers.* Theory does not conform to practice. To those attorneys who are trying cases under the Federal law, who have formerly tried them under the state law, it

is a matter of *common knowledge* that juries are much more free in finding contributory negligence where they understand that it merely *diminishes the damages.* Under the state law, and under the common law, the *natural sympathy* of the jury tends to pervert their judgment in deciding the question of contributory negligence, and *they are not to be blamed.* By their verdicts, in striking out contributory negligence as a *complete defense,* they have anticipated the legislatures in the states and also the National Congress in wiping out contributory negligence as a complete defense. They have done it by *masterful* findings of the facts. Now, however, as contributory negligence has by law been put in its proper place, so that it merely diminishes damages, the juries do and will decide the question with a more fair and even temper and disposition.

Therefore, we say that it is not right to conclude that a jury, passing on the question of contributory negligence, would, *beyond any doubt* make the same finding in a trial under the Federal act. I respectfully submit that if any member of this court would read Mr. Gray's own story in this case he would be satisfied that Gray convicts himself of contributory negligence. We have not in our own minds the slightest *doubt* that if this case can be tried under the Federal law, and a jury told that contributory negligence will merely diminish the damages, we may get a finding of contributory negligence. When we consider that the main part of the damages in this case is due to pulmonary tuberculosis developing a year after the accident, and resulting entirely *from the weakened condition predisposing to infection,* it is highly probable that the jury would have made a substantial apportionment of damages attributable to Gray's own negligence. The opinion of the Wisconsin Supreme Court shows that the weakness of this claim is only saved from annihilation because of the testimony of Gray's physician, to the effect that *in his opinion* the tubercular condition was a result of the injury. (Transcript page 292.)

In conclusion, under this part of the brief, we submit that it is impossible for this court to say that if the case had been tried under the Federal Act it still appears beyond *any doubt* that the result *could not* have been different.

Corrections and Comments.

First: On page 6 of Counsel's Brief it is stated that the testimony subsequently stricken out was received by the court "subject to objection". This is an error, as is demonstrated by reading the complete record on pages 678 and 679 of the same brief.

Second: On page 39 of Counsel's Brief it is stated "there is not a scintilla of evidence that Gray had hostled *an interstate engine* on that morning previous to his injury, or at any other time." This is an error. There were four engines dispatched on the morning before the accident. One was a local train starting from Rhinelander, two were switch engines and the fourth *was an engine which came from Ashland.* (Transcript page 59.) The engines coming from Ashland pass through Michigan. (Transcript 233, 237.) Thus it conclusively appears that *one* of the engines dispatched on the morning in question by Mr. Gray was an interstate engine. Besides that, it is a matter of common knowledge that *switch engines,* (of which two were dispatched on the morning in question) are constantly engaged in switching and moving interstate freight. This may be taken judicial notice of by the court on the same theory upon which the Wisconsin Supreme Court judicially noticed the fact that great railroad systems like the Chicago and North Western Railway Company are continually engaged in both kinds of commerce. (Transcript page 291.)

Third: On pages 39 and 40 in counsel's brief it is stated that there is no positive evidence in the record that any interstate engines had been taken care of on this cinderpit. The evidence referred to under the last point shows this as an error.

Fourth: On page 42 of Counsel's Brief it is argued that even the attorney for the railway company did not believe there was sufficient basis of fact to claim the application of the Federal Act, because it was not plead in the answer. The answer in this case was drawn, and the case was tried by the writer of this brief. The answer was served April 10, 1912. The case was tried in July, 1912. The company attorney entered railroad business only on the 1st day of January, 1912. He had not heard of the Federal Statute before January 1, 1912. The second Employers' Liability Act was

not decided until January 5, 1912. The Peterson case was decided May 26, 1913, and the Seale case on the same day, both of them being decided after the argument of this case in the Wisconsin Supreme Court. Those decisions brought out an entirely new view as to the scope and effect of the Federal Employers' Liability Act. Is it any wonder then that the railroad company's attorney showed some diffidence and some greenness on this question?

Fifth: On page 31 of Counsel's Brief he cites the case of La Crosse vs. Railway Company, 64 Southern, 1012, as holding that no substantial rights were affected by trying a case under the State law instead of under the Federal law. This must be a miscitation, for this case makes no such holding.

Sixth: On page 47 of Counsel's Brief, and elsewhere, great reliance is placed upon the Behrens case, 233 U. S., 473, and we are criticised for not referring to this case. We contend it has no application. In that case the fireman had no duties with reference to permanent structures like roadbed, tracks, cinder pits, or anything of that kind. His duty related solely to the movement of trains. At the moment of his injury his employment had been segregated into an isolated transaction, relating solely to intrastate commerce. To have held other than was held would have resulted, of course, in excluding all intrastate work if *some part* of an employe's duty related to interstate commerce. This was obviously not within the meaning of the Federal Statute. However, we ask what would have been the conclusion in the Behrens case if this man were operating a switch engine, switching alternately, during the day, first interstate and then intrastate cars, and had stopped with his engine on a side track during the lunch hour to eat lunch, and then was injured by a collision, or if he was injured while crossing the tracks on his way to his work in the morning, as in the Seale case. It is obvious that it would be held that he was still "on duty" within the meaning of the Zachery case, and that he was "employed in interstate commerce." Otherwise, the effect would be that one while not actually engaged in the movement of interstate commerce would be excluded from all rights under the Federal Act, simply because at some moment in the day he performed some act in relation to intrastate commerce.

SPECIAL NOTE.

Just as we are finishing this brief our attention has been called to the case of *Pittsburg C. C. & St. L. Ry. Co. vs. Glinn*, 219 Fed. Rep., page 148 (C. C. A.), published in Advance Sheet, March 11, 1915.

In that case the deceased was engaged in a switching service. At the moment of his accident he was lining up switches to switch more cars. It was conceded that the cars handled by the decedent shortly prior to his death carried both interstate and intrastate freight.

Held, that the jury were authorized to find that he was engaged in interstate commerce at the time of his death.

The court says:

"However, we can draw no inference from these and other familiar decisions of the Supreme Court, (including the Behrens case, 233 U. S., 473, * * *) and the way in which they have interpreted the statute, save that liability is created where the service being rendered is of a *general indiscriminate character not segregated and tied to shipments within the state*, (as in the Behrens case, supra, * * *) but applicable as well to interstate commerce, which the carrier is conducting."

We submit that this case is a strong authority for our contention, that although Gray was not immediately engaged in either kind of service at the moment of his accident, yet his whole employment was of an *indiscriminate character*, and at the moment of the accident his service *was not segregated or tied to shipments within the state* and, therefore, he was employed in interstate commerce.

In conclusion, we submit that the judgment of the Supreme Court of Wisconsin should be reversed.

EDWARD M. SMART,

Counsel for Plaintiff in Error
Chicago and North Western Railway Company.

APPENDIX.

WISCONSIN RAILWAY EMPLOYERS' LIABILITY ACT.

"*Crippling or Death Damages.* SECTION 1816. Every railroad company shall be liable for damages for all injuries whether resulting in death or not, sustained by any of its employes, subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employe:

Roadbed and Machinery Defects. (1) When such injury is caused by a defect in any locomotive, engine, car, rail, roadbed, machinery or appliance used by its employes in and about the business of their employment.

Fellow Employes' Negligence. (2) When such injury shall have been sustained by any officer, agent, servant or employe of such company, while engaged in the line of his duty as such and which such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent, servant or employe of such company, in the discharge of, or by reason of failure to discharge his duties as such.

Court's Questions to Jury. (3) In every action to recover for such injury the court shall submit to the jury the following questions: First, whether the company, or any other officer, agent, servant or employe other than the person injured was guilty of negligence directly contributing to the injury; second, if that question is answered in the affirmative, whether the person injured was guilty of any negligence which directly contributed to the injury; third, if that question is answered in the affirmative, whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company, or any officer, agent, servant or employe other than the person so injured; and such other questions as may be necessary.

Comparative Negligence. (4) In all cases where the jury shall find that the negligence of the company, or any officer, agent, servant or employe of such company, was greater than the negligence of the employe so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover, and the negli-

gence, if any, of the employe so injured shall be no bar to such recovery.

Question for Jury. (5) In all cases under this section the question of negligence and contributory negligence shall be for the jury.

Contracts and Rules Subordinate. (6) No contract or receipt between any employe and a railroad company, no rule or regulation promulgated or adopted by such company, and no contract, rule or regulation in regard to any notice to be given by such employe shall exempt such corporation from the full liability imposed by this section.

"Railroad Company" Defined. (7) The phrase "railroad company," as used in this section, shall be taken to embrace any company, association, corporation or person managing, maintaining, operating, or in possession of a railroad in whole or in part within this state whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver.

Conflict of Laws. (8) In any action brought in the courts of this state by a resident thereof, or the representative of a deceased resident, to recover damages in accordance with this section, where the employe of any railroad company owning or operating a railroad extending into or through this state and into or through any other state or states shall have received his injuries in any other state where such railroad is owned or operated, and the contract of employment shall have been made in this state, it shall not be competent for such railroad company to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

Shop or Office Employes. (9) The provisions of this section shall not apply to employes working in shops or offices." (Wis. Stat. 1911, pp. 1312-13.)

MOTION TO AMEND ASSIGNMENT OF ERROR.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff in Error,

VS.

WILLIAM H. GRAY,

Defendant in Error.

SIR:—

Please take notice, that the plaintiff in error, Chicago and North Western Railway Company, will, at the regular motion day of the above entitled court, to-wit, March 22, 1915, at the opening of court on said day, or as soon thereafter as counsel can be heard, or in case the said cause shall be called for argument prior to said date, then at the time said cause is called for argument, move the court, as set forth in the annexed written motion.

Respectfully,

EDWARD M. SMART,

Counsel for Plaintiff in Error.

To STEPHEN J. MCMAHON,

Attorney for Defendant in Error.

Service of the above Notice of Motion admitted this 11th day of March, 1915, without prejudice, however, to the rights of the defendant in error.

STEPHEN J. MCMAHON,

Counsel for Defendant in Error.

(Title.)

And now comes the above named plaintiff in error, Chicago and North Western Railway Company, and on the record herein, the briefs of counsel heretofore served and filed, and the affidavit of

Edward M. Smart herefo annexed, and moves this Honorable Court for leave to amend the Assignment of Errors in these proceedings, by adding to such Assignment of Errors, at the end of the seventh Assignment of Error, found on page seven of the Record (Transcript page 3), a further and additional Assignment of Error, in the following words, to-wit:

"Eighth: That the Municipal Court did not err in rejecting and striking out the testimony of the witness Armstrong, which was in substance as follows:

"Mr. Armstrong re-called by the defendant. I am familiar with the character and kind of business done by the Chicago and North Western Railway Company on our division at Antigo. As I understand it, interstate traffic is the exchange of business between two states.

Q. At and prior to the plaintiff's accident was the North Western road, its trains, engines and employes engaged in hauling cars of freight continuously between Michigan and State of Wisconsin and points in Illinois and State of Wisconsin?

A. Yes, sir.

Moved to have the answer struck out. Motion granted.

Objected to because it does not appear what employes are meant, and further objection is immaterial, incompetent and irrelevant as to whether their engines, their employes and their trains and crews may have or might have been in any respect engaged in interstate traffic, and that the only thing material, if at all, would be the use made of this particular engine, that is the engine on which the plaintiff was hostler.

By the Court: Objection sustained. The only question is as to this engine as I can see it; the engine on which this person was engaged at the time.

By Attorney Martin: My objection goes to all of these questions. 1st. Because the witness is not competent. 2nd. Because the testimony is not admissable under the pleadings. 3rd. The testimony itself is incompetent, irrelevant and immaterial.

Engines that were being hostled at this roundhouse at the time in question were making trips from Antigo to Ashland, going through Michigan. At the same time engines and trains were making connection with the Watersmeet branch (elsewhere appearing to be in Michigan). Engines running south won't run out of the state, but in coming to and going from the south they handle refrigerator cars from Chicago. The dispatcher is under the jurisdiction of the foreman of the roundhouse, and Mr. Gray was under the dispatcher's jurisdiction. The roundhouse is the place where all these engines

that come in from runs there rest. They clean all the coal and cinders out and get wood and water and are put in there to stay until the next trip. Some repairs are done in the roundhouse too. The dispatcher takes the engine, after the train crew leaves it, near the roundhouse. The roundhouse, with the coal shed, sand house and cinder pit and the blow-off box and these other buildings are all crowded together. I know of no definition in the railroad service as to what constitutes employes, or who shall be employed on the road, and no standard is fixed so far as I can see as to where the division line is.

Exhibit "9" is a photograph taken at or near the north end of the cinder pit looking south in the City of Antigo.

The plaintiff now moves to strike out all the testimony of this witness except his testimony identifying Exhibit "9", for the reason urged in our objection to the testimony when first offered, that is the testimony elicited from this witness since he was last called to the witness stand, and bearing generally upon the question of so-called interstate traffic.

The motion is granted as far as the testimony goes to the phase of interstate traffic.

Whereupon the defendant duly excepted.

The plaintiff moves to strike out the balance of the testimony, for the reason it is immaterial, incompetent and irrelevant, and now moves to strike it out.

The motion is granted.

Whereupon the defendant duly excepted." (Transcript pp. 236 to 238.)

Plaintiff in error submits the following Statement of Facts and Objects of this Motion:

This is a proceeding in error to review a decision and judgment of the Supreme Court of the State of Wisconsin, affirming a judgment of the Municipal Court of Outagamie County, Wisconsin, in a personal injury action brought by the defendant in error against the plaintiff in error, to recover damages on account of injuries received by the defendant in error, while in the employ of the plaintiff in error. The respective parties will be referred to as "Gray" and "Railroad Company".

Gray was run down and injured by an engine in the railroad yards at Antigo, Wisconsin, while employed by the railroad company as an engine dispatcher.

The complaint in the action was not brought under the Federal

Employers' Liability Act, and did not disclose that either Gray or the Railroad Company were employed in interstate commerce at the time of the injury. Gray, in presenting his case in the trial court, proved the facts showing the nature and character of his employment and duties, but did not disclose employment in interstate commerce. When the railroad company took the case, in addition to other facts proven in the case without objection, it introduced the evidence of the witness Armstrong, set forth in the above proposed additional Assignment of Error, which evidence was subsequently stricken out,, as above set forth, for the reasons specified. It was claimed by the railway company that this proof, together with the other facts admitted in evidence, showed or tended to show employment by Gray in interstate commerce, and that if there was any liability on account of such injury it was governed and determined solely by the Federal Employers' Liability Act.

Judgment was rendered against the railway company in the trial court, and an appeal was taken to the Supreme Court of the State of Wisconsin, wherein the judgment of the trial court was affirmed in an opinion, decision and judgment of the said Supreme Court, which is fully set forth in the record. (Transcript 286, 293.)

The said Supreme Court held, under the evidence received, and the said evidence so stricken out as aforesaid, that the said Gray was not employed in interstate commerce. While it is true that in said court the error reviewed by it was the ruling of the trial court, striking out the said evidence, yet it is apparent from said opinion that the court treated the same as if admitted, and then determined the nature and character of Gray's employment from said evidence and all the other evidence in the case. That thereupon, the railway company filed its petition for Writ of Error, and made Assignments of Error, as set forth in the record. (Transcript pp. 3 and 4). That said record was filed in this court on the 2d day of August, 1913, and the same was printed, and copies thereof delivered to counsel for plaintiff in error on or about the 21st day of Sept., 1914. That copies of the said Assignments of Error and the record were exhibited to and seen by the counsel for the defendant in error some time during the month of July, 1913.

That on the 6th day of February, 1915, counsel for the railway company duly served upon counsel for Gray a copy of his original

brief; that a few days before March 1, 1915, counsel for Gray submitted to counsel for the railway company a copy of a part of the manuscript of his brief, wherein was set forth and argued the point that the Assignment of Errors and Specification of Errors were insufficient under the statutes and rules of this court, which said point and argument are now set forth on pages 32 and 33 of the printed brief of defendant in error.

That immediately upon receiving said manuscript brief, as aforesaid, counsel for the railway company reprinted his brief under the title of "Amended Brief of Plaintiff in Error," and added thereto a fourth "Specification of Error," which said fourth Specification of Error is found on pages 11 and 12 of "Amended Brief of Plaintiff in Error," in the same language as is set forth in the above proposed eighth Assignment of Error; that the said reprinted and amended brief was duly and personally served on counsel for Gray on the 1st day of March, 1915, at 10:30 A. M., as appears by the proof of service on file in this court, and thereupon thirty copies of the said "Amended Brief of Plaintiff in Error" were immediately and duly filed with the Clerk of this court, and are now on file herein; that at the time of the service of said amended brief of plaintiff in error the brief of defendant in error was in the process of being printed, and was thereafter completed and served on counsel for the railway company on the 3d day of March, 1915, at 5:30 P. M.; that counsel for the railway company had never, prior to the service of said manuscript, received any notice or intimation from counsel for Gray of his intention to make such a point, or his claim in regard thereto, nor has the said counsel ever made any motion in this court, based on the inadequacy of said Assignment of Errors.

That the failure of counsel for the railway company to make proper Specification of Errors was due to inadvertence and oversight, and due to the peculiar manner in which the question was raised, discussed and disposed of in the State Supreme Court, as more particularly set forth in the affidavit of counsel for the railway company hereto annexed.

Counsel for plaintiff in error submits the following authorities

on the proposition that this court has power and authority to permit amendment of Assignment of Errors, to-wit:

2 Encyclopedia Pleading and Practice, 920.
Ackley vs. Hall, 106 U. S., 428.
Bunyan vs. Loftus, 57 N. W., 685.
Hall vs. Railway, 84 Ia., 311.
Hubbard vs. Garner, 73 N. W., 390.

EDWARD M. SMART,

Counsel for Plaintiff in Error.

Dated March 10, 1915.

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

WILLIAM H. GRAY,

Defendant in Error.

STATE OF WISCONSIN, } ss.
MILWAUKEE COUNTY, }

Edward M. Smart being first duly sworn, on oath says that he is counsel for the above named plaintiff in error; that he has read the foregoing and annexed Motion and Statement of Facts and Objects of Motion, and that the facts and objects therein set forth are true, as he verily believes; that the failure to make an accurate Assignment of Errors in this proceeding was due entirely to affiant's inexperience in proceedings of this kind, and also to the inadvertence and oversight of affiant.

Affiant further says that proceedings by way of Writ of Error to review the decisions of inferior tribunals is not employed excepting in criminal cases and rare instances in the State of Wisconsin,

the common and statutory method of review in said state being by statutory appeal; that affiant has never, in any proceeding heretofore, excepting in one instance, sued out a Writ of Error; affiant further says that the reason why said proposed Assignment of Error was not made in the form now proposed was that because of the manner in which the said questions raised thereby were treated and discussed in the Supreme Court of the State of Wisconsin he was led to believe, and did believe, that the said court treated the evidence rejected the same as if it had been admitted, and decided the whole question the same as if said evidence had been admitted; that by reason thereof affiant inadvertently overlooked the fact that the said ruling was technically a ruling on the rejection of evidence, and for that reason an assignment of error should have been made in the form now proposed.

Affiant further says that no harm or prejudice has been done to the defendant in error, and the said defendant in error and the plaintiff in error have both fully set forth the facts and rulings in their respective briefs, and have fully set forth at length in said briefs the evidence so rejected.

Subscribed and sworn to before me this 10th day of March, 1915.

EDWARD M. SMART,

ALBERT M. KELLY,

Notary Public, Milwaukee County, Wisconsin.

My Commission expires Oct. 13, 1918.

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

WILLIAM H. GRAY,

Defendant in Error.

REPLY AFFIDAVIT.

STATE OF WISCONSIN, }
MILWAUKEE COUNTY, } ss.

EDWARD M. SMART, being first duly sworn on oath says:

That he has read the affidavits of William H. Gray, Stephen J. McMahon, Jeremiah F. Collins and Raymond T. Zillmer served upon him in the evening of March 13, 1915.

Affiant admits that after Mr. Gorman had made service of the "Amended Brief of Plaintiff in Error" as appears from the proof of service on file, the counsel for the Defendant in Error caused said briefs to be returned to and placed upon the desk of affiant in a sealed unmarked package by messenger unknown to affiant or the employes in his office;

That upon the said package being opened and contents examined, the same were enclosed in an envelope and remailed to Mr. McMahon, Attorney for the Defendant in Error, but by mistake a return card was left on the envelope and Mr. McMahon refused to receive the same and they were returned to affiant's office; that they were remailed to Mr. McMahon by the first mail thereafter in an envelope with postage prepaid and with no return card thereon, and the same have never been returned to or received by this affiant or by the plaintiff in Error or any one in its behalf.

EDWARD M. SMART.

Subscribed and sworn to before me this 15th day of March, 1915.

EDWARD M. SMART,

ALBERT M. KELLY,

Notary Public, Milwaukee County, Wisconsin.

My Commission expires Oct. 13, 1918.

Service of the foregoing is hereby accepted, and delivery of three copies thereof is hereby acknowledged this ... day of March, 1915.

.....

Counsel for Defendant in Error,
William H. Gray.

IN EXPLANATION.

On February 6th, 1915, there was served on the attorney for the defendant in error and accepted, the brief of plaintiff in error. On March 1st, 1915, service of three copies of this brief, reprinted, with an addition to the specification in errors and an assignment of errors, was tendered to the attorney for the defendant in error and the service and the copies were by him refused.

About a week previous to this tender, a carbon copy of the major part of the typewritten manuscript of the body of the brief of defendant in error was delivered to the attorney for plaintiff in error and two days before the tender the balance of the copy of the manuscript was mailed to the same attorney. In the part of the manuscript delivered first issue was joined with all parts of the brief of plaintiff in error and insufficiencies of its specification of errors and assignment of errors were pointed out. Throughout the whole manuscript there were numerous references to the brief of plaintiff in error, citing the numbers of the pages. At the time of the tender of service all of the original of this manuscript was in the hands of the printer and the part in which issue was joined with the brief of plaintiff in error was in type. Tender of the service was refused for this reason and for the further reasons that expense and lack of time prevented a revision of the manuscript; that it was desired not to waive any defects in the assignment of errors and specification of errors in the brief of plaintiff in error; and that it was at least probable that the time for the plaintiff in error to serve and file its brief had expired. This brief is, therefore, addressed only to the brief of plaintiff in error as served in the first instance.

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Supreme Court of the United States

OCTOBER TERM, 1914, No. 232.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM H. GRAY,
Defendant in Error.

In Error to the Supreme Court of the State of Wisconsin.

BRIEF OF DEFENDANT IN ERROR

I.

STATEMENT OF CASE.

This case was brought to this Court upon a writ of error to review a judgment of the Supreme Court of Wisconsin affirming a judgment of the Municipal Court of Outagamie County, in favor of the defendant in error and against the plaintiff in error, for damages for personal injuries sustained while in its employment.

Introductory Explanation.

Part of this brief is a reply to the brief of the plaintiff in error, served February 6th, 1915; and

a part fully as large is devoted to several questions which are not presented in that brief.

In the interests of brevity throughout this brief the plaintiff in error is referred to as "the company" and the defendant in error, Mr. Gray, as "Gray"; and the printed transcript of the record is referred to by use of the abbreviation "T."; and the Company's brief by use of the abbreviation "C. B."

Facts.

The facts are undisputed except upon the issues covered by findings made by a jury in a special verdict set forth fully herein.

On January 19th, 1911, Gray, then of the age of 51 years, 29 of which had been spent in the service of the company, was seriously and permanently injured, while employed by the company in the line of his duty as engine dispatcher or hostler [these latter terms being synonymous (T. 82)] in the *yards* of the company at the City of Antigo in the State of Wisconsin, by being struck by one of the company's locomotive engines then being driven by one of the company's engineers, as a result of the negligence of the engineer in the discharge of his duty as such. At the time of his injury, Gray was proceeding along a well-beaten foot path, customarily and frequently used by him and others, and extending between and parallel with a coal shed and a side track. He was going to his rest room or shanty which was just across this track to await the arrival of an engine to be hostled, or other duty to be performed, by him. He usually spent his leisure time in this rest room. It was necessary for him to cross this track to get to his rest room. There was arising from a cinder pit under the track near by a cloud of smoke, steam and gas which overhung the track and wholly ob-

scured his vision. Having stood, listened and made a futile attempt to look for an engine, as he was about to start to cross the track on his way to his rest room, he was struck by the side of the overhanging front part of the engine which came upon him without fault on his part, negligently and unexpectedly, in violation of a rule of the company, duly promulgated in an order or bulletin, and requiring engines delivered on that track to be hostled to be stopped south of the opposite or south end of the cinder pit, at an excessive rate of speed and without the bell on the engine being rung. (See findings 2, 3, 4, 6, 7, 9, 10 and 11, special verdict, post pp. 4-5.) If the statement contained in the first sentence on the top of page 2 of the company's brief to the effect that Gray was then "walking across one of the railroad tracks" is to be construed to mean that he was actually upon the track and not beside it when he was struck, the statement is erroneous. The engine was "drifting" which means moving by the force of its momentum, and was not puffing. Any noise made by the engine was rendered wholly inaudible, or indistinguishable by the sizzling noise produced by the throwing of cold water on the hot coals in the cinder pit nearby, which was the only noise which Gray could hear. On this foot-path, and at the point where he was struck, he had a maximum clearance of 4¾ feet; he had a minimum clearance of about 1½ feet after allowing for the overhang of all parts of the engine, all of which were considerably above the ground, and not allowing for the numerous spaces, each 4 feet in length and 10 inches in depth, between the posts or studdings outside of the coal shed which gave him a maximum clearance of about 2⅓ feet after allowing for the

overhang. He walked in the safest place open to him and was about to start to cross the track at a point opposite his rest room when he was injured. (T. 64, 67-8, 107-08, 111-14, 146-9, 182, 151-2, 154-5, 215-16, 222-23, 247, 254, 256.)

The location of the rest room and other features of the situation are amplified by the two photographs opposite page 280 (T. 238), as well as by the map and the photograph opposite pages 284 and 285 respectively of the transcript to which attention is called in the company's brief.

Gray duly commenced in the Municipal Court of Outagamie County, Wisconsin, a personal injury action for the recovery of damages from the company (T. 11-16). After joinder of issue, and a trial and argument before a jury of all issues of fact which were not abandoned (T. 24-256) the Court submitted to the jury a special verdict as requested by the company and substantially in the form proposed by the company, covering all of the disputes of fact in the case; and the questions in the special verdict were submitted to the jury under unusually full instructions, including among others 50 out of 52 instructions requested by counsel for the company. (T. 153, 257, 270.)

All of the questions and answers of the special verdict are as follows:

> "1. Was the plaintiff, on the 19th day of January, 1911, struck by one of defendant's engines and injured?
>
> Answer: Yes. (By the Court.)
>
> 2. Did the defendant, prior to the day of the plaintiff's injury cause an order to be issued providing in substance that engines delivered on coal shed track to be dispatched, should stop south of the cinder pit?
>
> Answer: Yes.

3. If you answer question numbered two "yes," was such order abrogated prior to the day of the plaintiff's injury?

Answer: No.

4. If you answer question numbered two "yes" and question numbered three "no" then was Engineer Kane guiltly of negligence in running his engine north of the cinder pit in violation of such order at the time plaintiff was injured?

Answer. Yes.

5. If you answer question numbered four "yes," then was such negligence of Engineer Kane a proximate cause of plaintiff's injury?

Answer: Yes.

6. Was the engine bell of the engine that struck plaintiff ringing at and immediately prior to the time of plaintiff's injury?

Answer: No.

7. If you answer question numbered six "no," then was Engineer Kane guilty of negligence in failing to cause the engine bell to be rung immediately prior to the time of plaintiff's injury?

Answer: Yes.

8. If you answer question numbered seven "yes," then was such negligence a proximate cause of plaintiff's injury?

Answer. Yes.

9. Under the circumstances existing was Engineer Kane guilty of negligence in running the said engine north of said cinder pit to the place where it struck plaintiff at the rate of speed at which he was running?

Answer: Yes.

10. If you should anwer question numbered nine "yes," then answer this: Was such negligence a proximate cause of plaintiff's injury?

Answer: Yes.

11. Was the plaintiff guilty of any negligence which proximately contributed to his injury?

Answer: No.

12. If you should answer the eleventh question "yes," then answer this: Was the said negligence of Kane greater than that of the plaintiff?

Answer: (No answer.)

13. If you should answer the twelfth question "yes," then did such negligence contribute in a greater degree to the plaintiff's injury than did that of the plaintiff?

Answer: (No answer.)

14. What sum will justly compensate the plaintiff for the injuries sustained by him?

Answer: $7,815.00. Seven thousand eight hundred and fifteen dollars."

Without any pleading whatsoever covering the subject, (T. 11-19.) testimony was offered by the company for the first time near the conclusion of the trial, (T. 236.) was *received by the Court subject to objection,* and ultimately stricken out, as follows:

"Mr. Armstrong recalled by the defendant.

Q. Mr. Armstrong you are familiar with the character and kind of business done by the Chicago & Northwestern Railway Company on your division at Antigo?

A. Yes sir.

Q. Can you state whether or not that line of road in that division is constantly engaged in interstate traffic?

Objected to as immaterial and further that the witness is not competent to testify as to interstate traffic.

Q. Do you know what is meant by interstate traffic?

A. I believe I do, yes. It is the exchange of business between two states.

Q. At and prior to the plaintiff's accident was the Northwestern road its trains, engines and employees engaged in hauling cars of freight continuously between Michigan, and state of Wisconsin and points in Illinois and state of Wisconsin?

A. Yes sir.

Moved to have the answer struck out. Motion granted.

Objected to because it does not appear what employees are meant and further objection is immaterial, incompetent and irrelevant as to whether their engines, their employees and their trains and (T. 236.) crews may have or might have been in any respect engaged in interstate traffic, and that the only thing material, if at all, would be the use made of this particular engine, that is the engine on which the plaintiff was hostler.

By the Court: Objection sustained. The only question is as to this engine as I can see it; the engine on which the person was engaged at the time.

By Attorney Martin: My objection goes to all of these questions. 1st. Because the question is not competent. 2nd. Because the testimony is not admissable under the pleadings. And 3rd. The testimony itself is incompetent, irrelevant and immaterial.

Q. Were engines that were being hostled at this round house at the time in question making trips from Antigo to Ashland?

A. Yes.

Q. Did they go through Michigan?

A. Yes sir.

Q. And at the time were engines and trains making connections with the Watersmeet branch?

A. Yes sir.

Q. The engines running south wouldn't run outside the state?

A. No sir.

Q. Do these going and coming from the south handling refrigerator cars come from Chicago?

A. Yes sir.

Q. The dispatcher is under the jurisdiction of the foreman of the round house?

A. Yes sir.

Q. And Mr. Gray was under his jurisdiction?

A. Yes sir.

Q. As I understand it the round house is the place where all of these engines that come in from runs there rest?

A. Yes sir.

Q. And clean all the coal and cinders out and get wood and water and were put in there to stay until the next trip?

A. Yes sir.

Q. The round house with the coal shed, sand house and the cinder pit and the blow off box and these other buildings are all crowded together?

A. They are.

Q. You know of no definition in the railroad service as to what constitutes employees or who shall be employed on the road?

A. No sir.

Q. No standard fixed so far as you can say as to where the division line is?

A. No sir. (T. 237.)

Q. Mr. Armstrong I show you Exhibit "9" and ask you if that is a photograph taken at or near the north end of the cinder pit looking south in Antigo?

A. Yes, it is.

The plaintiff now moves to strike out all the testimony of this witness except his testimony identifying Exhibit "9" for the reasons urged in our objection of the testimony when first offered, that is the testimony elicited from this witness since he was last called to the witness stand and bearing generally upon the question of so called interstate traffic.

The Motion is granted as far as the testimony goes to the phase of interstate traffic.

Whereupon the defendant duly excepted.

The plaintiff moves to strike out the balance of the testimony for the reason it is immaterial, incompetent and irrelevant and now move to strike it out. The motion is granted.

Whereupon the defendant duly excepted." (T. 238.)

Exhibit "9" described above, by the witness Armstrong in these quoted words as a *"photograph taken at or near the north end of the cinder pit looking south"* was later described in these identical quoted words by the learned counsel for the Company and offered as an exhibit with other exhibits *and received as such.* This all appears expressly in the printed transcript of the record (T. 238). As a matter of fact the original of the record in the Supreme Court of Wisconsin shows that in the offer of this exhibit the quoted words were preceded by a line as follows: "Defendant also offers in evidence Defendant's Exhibit '9' being" * * * * This line is omitted from the printed transcript.

As appears from the map and photograph opposite page 284 of the transcript this exhibit "9" is such photograph. (T. 238.)

The striking out of this testimony after it had been thus received subject to objection is all that there is in this case which in any way gives rise to

a question touching interstate commerce within the purview of the Federal Employers' Liability Act.

After the special verdict was returned by the jury, counsel for the company made in writing, 15 motions having for their purpose the avoiding of the verdict and every part thereof and the entry of judgment in its favor, or in the alternative the granting of a new trial. The 15th motion, a motion in the alternative for a new trial was expressly based on 13 grounds, the second ground being for the exclusion of testimony (T. 271-273.) After argument all of these motions were overruled and judgment was ordered and entered for Gray in accordance with the verdict. (T. 19-21, 273-274.)

The company appealed from the judgment of the trial court to the Supreme Court of Wisconsin.

After the submission of printed briefs and oral argument before all of the 7 members of the Court of last resort of this state, the judgment of the Municipal Court was affirmed; and all of the justices concurred in the opinion written by Mr. Chief Justice Winslow. (T. 19, 286-293.)

The decision of the Supreme Court of Wisconsin is reported in 153 Wisconsin Reports, 637, (official) and in 142 Northwestern Reporter, 505.

The case is here on a writ of error from this Court to the Supreme Court of Wisconsin.

Decision of Wisconsin Courts.

As has been pointed out the trial court struck out the company's testimony pertaining to the applicability of the Federal Employers' Liability Act after receiving it subject to objection; then the company moved for a new trial on the ground among others of error in the exclusion of testimony

and the motion was denied. On the appeal to the Supreme Court of Wisconsin, a question as stated in its decision was raised as follows:

> "Winslow, C. J.,
> The appellant makes five contentions, viz: . . .; . . .; (3) that the court erred in refusing to receive evidence tending to show that the plaintiff was employed in interstate commerce at the time of his injury; . . .; . . .; these contentions will be discussed in their order." (T. 289.)

The final conclusion and decision of the Supreme Court of Wisconsin as to this 3rd contention is as follows:

> "III. . . .; We conclude, therefore, that there was no error in these rulings." (T. 290-292.)

The enumeration of the contentions was preceded in the decision of the Supreme Court of Wisconsin by a rather full statement of the case, in which the special verdict was set forth fully; (T. 286-289) and this enumeration is followed by a full discussion of all of the contentions in which appears the Court's conclusion as to the 3rd as set forth above. (T. 289-293.) After this duscussion of all of the 5 contentions the decision ends with the following disposition of all other questions in the case:

> *"There are no other contentions which require treatment.*
> By the Court: *Judgment affirmed"* (T. 293).

Questions Involved.

This conclusion of the Wisconsin Supreme Court as to the striking out of this testimony as heretofore set forth, is all that there is in this case, in any way touching interstate commerce within the purview of the Federal Employers' Liability Act, to be reviewed by this court upon this writ of error.

The questions presented by the record and now desired raised are as follews:

1st. Whether this court has jurisdiction?

This question is divisible into two parts as follows:

(A) Whether this court has failed to acquire jurisdiction because of a defect in the writ of error not susceptible of amendment?

(B) Whether the decision of the Federal question is sufficiently *necessary, controlling* or *material* to the decision of the case to render it sufficiently devoid of frivolousness to sustain *jurisdiction?*

2nd. Whether if this court does entertain jurisdiction it is sufficiently clear that the error complained of (*if error*) has worked *prejudice to the substantial rights* of the company to such an extent as will *require reversal?*

3rd. Whether the Supreme Court of Wisconsin erred in affirming the decision of the trial court by refusing to grant a new trial because of error in the rejection of the testimony pertaining to interstate commerce offered by the company?

4th. Whether Gray is entitled to damages in this court?

The third is the only question touched upon in any way in the company's brief. (C. B. 11.)

This statement of the case will be supplemented in the argument.

II.

ARGUMENT.

1st. This Court has no jurisdiction.

> "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, . . . This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."
>
> *F. R. S. Co. v. Hagg,* 219 U. S. 175 at 177.
>
> *M. C. & L. M. R. Co. v. Swan,* 111 U. S. 379.
>
> *Hilton v. Dickinson,* 108 U. S. 165.

(A.) The first question is whether this Court has failed to acquire jurisdiction, because of a defect in the writ of error not susceptible of amendment.

The writ is *jurisdictional;* and because of the gravity of any question of *jurisdiction* it is deemed a duty to call the court's attention to the question, even though in the solution of it there may arise only doubt.

Section 1004 Revised Statutes as amended by *Act of Jan. 22, 1912, (37 Stats. L. 54.),* provides that writs of error returnable to this Court may be issued by the "Clerks of the district courts," or others enumerated in the statute.

This writ was not issued or signed, by a clerk, but by a deputy (T. 1.); and the absence of the clerk is not accounted for.

There is no express statutory provision authorizing the writ to be issued by a *deputy clerk.*

Previous to 1901, a statute provided that *"all clerks* of the United States Courts" were authorized to administer oaths; this statute was likewise silent upon the authority of a deputy clerk.

Act of May 28, 1896, Ch. 252. Section 19, (29 stats. L. 184.)

Notwithstanding that this statute was applicable to *"all clerks,"* congress apparently deemed it necessary to amend the act so as to include *deputy clerks* by an amendment, bringing into the statute the words *"and all deputy clerks."* This was the only amendment embodied in the amending act.

Act of March 2, 1901, Ch. 814, (31 Stats. L. 596.)

It is significant that the *intention* of congress not to include *"all deputy clerks"* in legislation conferring power on "all clerks," was manifested previous to the enactment of the statute conferring on "clerks of the district courts" the power to issue writs of error.

It is also signficant that the *intention* of congress thus manifested was manifested subsequently to all of the decisions about to be cited; and these include decisions tending to sustain the sufficiency of the writ as well as those tending to sustain the contrary view.

By analogy in principle, at least, these cases tend to sustain the view that "a deputy clerk" of the district court has no power to sign or issue a writ of error unless the absence of the clerk is accounted for.

Havenor v. New York, 170 U. S., 408.

Willock v. Wilson, 178 Mass., 68; 59 N. E. 757.

United States v. Antz, 16 Fed. 119 at 122.

There is no authority permitting an amendment of the writ unless the defect suggested be a defect "of form."

Revised Statutes, Section 1005.

"This writ is not mere matter of form, but matter of *substance,* prescribed by law, and essential to the *jurisdiction* of this court. And if it were amended here, by making the plaintiffs in error defendants, and the defendant in error the plaintiff, it would be a new writ made here, and not the one issued by the officer appointed by law . . . .

The case *(Hines v. Papin.)* was, indeed, even stronger for the amendment than this, for counsel appeared in this court for each of the parties, and offered to amend by consent. Yet the court refused to amend, upon the ground that consent of parties would not give jurisdiction, where it was not given by law and legal process . . . . It is the duty of the party who desires to bring a case before this court, to see that proper and legal process is sued out for that purpose; and if he fails to do so, he has no right to treat the defect as a mere *clerical* error, for which he is not to be held responsible."

Hodge v. Williams, 22 Howard, 87, at 88 to 89.

"But the want of a writ of error, such as is prescribed by the act of Congress, stands on different ground. And in the case of the *United States v. Curry,* 6 How., 118, the court held, that where the power of the court to hear and determine a case is conferred by

> acts of Congress, and the same authority which gives the jurisdiction points out the manner in which it shall be brought before us, *we have no power to dispense with the provisions of the law, nor to change or modify them.*"
>
> *Carroll v. Dorsey,* 20 Howard, 204, at 207 and 208.

The foregoing cases call for a strict construction of and compliance with statutes governing the issuance of writs or error.

Decisions, *not involving writs of error, however,* which tend to sustain the view that a "deputy clerk" has power to issue and sign a writ of error are:

The Confiscation Cases, 20 Wall. 92, at 111.

Garpeau v. Dozier, 100 U. S., 7.

The first of these cases involves the issuance of a warrant and the second the certification of a transcript—*both ordinary routine duties of a clerk,* but the case at bar involves the signing and issuing of a writ of error giving to this Court, the highest court of the land, its jurisdiction—*acts giving vitality to the writ and requiring the performance of an unusual duty and the exercise of extraordinary power.*

There is authority, some of which, at least, is *dicta,* tending to support the view that a defect of the character of the suggested defect is a defect in form only.

Miller v. Texas, 153 U. S., 535.

It is desired that this branch of the argument be not pressed beyond the imperative requirements of the duty attempted to be discharged by it.

(B.) The decision of the federal question is not sufficiently *necessary*, controlling or material to the decision of this case to render it sufficiently devoid of frivolousness to sustain the *jurisdiction* of this court.

Facts.

As heretofore pointed out (ante p. 4) every disputed question of fact was determined by the jury in its special verdict and resolved in Gray's favor.

In this branch of the argument it will be assumed that the trial court refused to strike out all of the testimony offered by the Company upon the question of interstate commerce and received subject to objection as heretofore fully set forth (ante p. 6). It will be further assumed, *solely for the purpose of the argument, and without in any way conceding it to be the fact,* that this testimony offered by the Company on the question of interstate commerce established that Gray was engaged in a task of interstate commerce at the moment of his injury within the purview of the Employers' Liability Act (*the negative of this latter assumption is in fact vigorously maintained in the third branch of this argument*, (post, p. 32), as well as establishing *merely*, as it did, that the company was an interstate commerce railroad.

Application of Law to Facts.

No attack is made in the Company's brief upon the findings of fact made by the jury in its special verdict. By silence in this respect in its brief the Company concedes that these findings are not now open to attack. Furthermore, no error is assigned because of error in the instructions upon the law

given to the jury by the trial court before the jury retired to consider its special verdict.

It would avail the Company nothing to attack the findings of fact made by the jury because in the absence of error in the instructions or directions to the jury, this court will not review or disturb these findings for the reason that upon a writ of error, this court will not review or disturb findings of fact made by a jury in a state court; this court will regard such findings as a verity in the record and binding upon this court, and will review only the questions of law arising upon such findings.

Willoughby v. Chicago, No. 2 U. S. S. C. Adv. Op., 1914, p. 23 (Dec. 15).

S. A. L. Ry. v. Duvall, 225 U. S., 477.

S. O. Co. v. Brown, 218 U. S., 77.

W. P. O. Co. v. Texas, 212 U. S., 86.

Telluride Power Transmission Co. v. R. G. Co., 187 U. S., 569.

All questions of fact on undisputed evidence are for the court and not the jury, and the court's finding will likewise not be disturbed or reviewed by this court on a writ of error.

Patton v. T. P. Ry. Co., 179 U. S., 658.

Graber v. D. S. S. & A. Ry. Co., 150 N. W. (Wis.), 489, infra. (C. B. 15.)

"There shall be no reversal in the Supreme Court * * * upon a writ of error * * * *for any error in fact.*"

Revised Statutes, Sec. 1011.

Result Same Under Federal as Under Wisconsin Act.

Assuming, *for the purposes of the argument only,* as heretofore suggested that none of the evidence offered by the Company had been stricken out and that it established Gray as well as the Company to be in interstate commerce within the purview of the Federal Act, it is found that under the findings of fact made by the jury, the result—the judgment in form, substance and amount—would be exactly the same under the Federal Act as under the Wisconsin Act.

For convenience of comparison and reference the Federal and Wisconsin Acts are set forth fully verbatum in an appendix. (Post, pp, 74, 75.)

The only negligence found by the jury in its special verdict is the *threefold* actionable negligence of the Company's engineer, Kane, a fellow servant of Gray, who drove the engine that struck Gray (ante, p. 4). Section 1 of the Federal Act and Section 2 of the Wisconsin Act (post, p. 74) impose liability upon the Company for the engineer's negligence.

In the 11th finding of the special verdict the jury found that Gray was *not guilty of contributory negligence.*

Under Section 3 of the Wisconsin Act (post, p. 75), if the jury had found Gray guilty of contributory negligence it would have been the duty of the jury to answer the 12th and 13th questions in the special verdict and thereby make findings respectively as to whether the engineer's negligence was greater than Gray's, and also whether it contributed in a greater degree to Gray's injury; but

the 12th and 13th questions became wholly *immaterial* since Gray was found *not guilty of contributory negligence.*

Upon the whole record, and in view of all provisions of both Acts, if the disputed issues of fact has been submitted to the jury under the Federal Act the same *identical* questions of the special verdict would have to be submitted to the jury with the exception of the 12th and 13th, now wholly *immaterial* under either act, in view of the jury's answer to the 11th question, acquitting Gray of contributory negligence.

Under Section 3 of the Federal Act, in submitting to the jury the 14th question of the special verdict, which required the jury to assess Gray's damages (post, p. 76), it would have been appropriate to instruct the jury that if they found Gray *"guilty of contributory negligence,"* it would "not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe," or in other appropriate words answering the requirements of this section of the Federal Act; *but since the jury found that Gray was not guilty of contributory negligence, it is now wholly immaterial under the provisions of the Federal Act that this instruction was not given.* Without contributory negligence on Gray's part there was no provision of law requiring or authorizing that "the damages shall be diminished by the jury" or otherwise or for any cause.

In the Company's brief it is stated that the case was submitted to the jury under the "Wisconsin Railroad Law." (C. B. 8.) If by this it is meant to suggest that the form of the verdict is now in any way *material*, the suggestion is erroneous. The

only thing in the special verdict to indicate that it was submitted under the Wisconsin Act is the insertion of the 12th and 13th questions. As pointed out, they became wholly *immaterial.*

Furthermore, there is not a syllable in the lengthy instructions given to the jury in any way indicating to the jury which Act governed. There was nothing erroneous or prejudicial in the instructions under either Act. (T. 257-269.) Nothing erroneous or prejudicial is pointed out in the Company's brief.

The construction of the Federal Employers' Liability Act was not in any way involved in the instructions given to the jury by the trial court.

Seaboard Air Line Ry. v. Duvall, 225 U. S., 477.

A careful examination of all of the evidence offered, disputed and undisputed, coupled with a careful examination of all of the provisions of both Acts, demonstrates that every issue of fact raised in the case is covered by the findings in the special verdict.

There are some differences between the provisions of the two acts; *but there are no facts whatever pleaded or proven which would work any difference in the result because of differences in the provisions.*

To illustrate, Section 4 of the Federal Act preserves the defense of assumption of risk except "where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

But there is no allegation or proof by the Company of any assumption of risk by Gray; neither

is there any allegation or proof by Gray of violation by the Company of any statute enacted for the safety of employes which contributed to Gray's injury.

The Wisconsin Supreme Court found that while there was evidence upon which the jury might have found Gray guilty of contributory negligence the question of his contributory negligence was a proper one for the jury and not for the Court (T. 286-290.); and this evidence is the only evidence anywhere in the record of fault on Gray's part. This evidence of fault on Gray's part is based wholly on Gray's undisputed testimony and testimony covered by the findings of the jury. (T. 288-289.) As a matter of law none of this evidence tends in any way to establish assumption of risk on Gray's part.

Y. & M. V. Ry. Co. v. Wright No. 4 U. S. S. C. Adv. Op., 1914, p. 130 (Jan. 15).

Seaboard Air Line v. Horton, 233 U. S., 492 at 503.

Other *immaterial differences* in the *Federal Act* and Wisconsin Act might be pointed out; *but there are no facts pleaded or attempted to be proven, in the case at bar in any way involving such differences.*

Under either act the result—the form, substance and amount of the judgment—must be the same.

No Federal Question Sufficient to Give This Court Jurisdiction.

The writ of error at bar is sued out under Section 237 (formerly Revised Statutes, Sec. 709) of the

Judicial Code. (T. 28.) The part of this Section which gives the Court jurisdiction in the case at bar provides for a writ of error from this court to the State Court:

> "where any title, right, privilege, or immunity is claimed under * * * any * * * statute of * * * the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed;"

It is apparent from a mere examination of this phraseology that to give this court jurisdiction there must be a denial of a right, privilege or immunity; that such denial must be injurious or prejudicial to the party complaining; and that such denial must be real, substantial and prejudicial, and not imaginary or speculative.

The mere fact that an action or a defense is based on a Federal statute or that there is a Federal statute involved or applicable is not sufficient to give this court jurisdiction; but in addition it must appear affirmatively from the whole record that there is a real and substantial dispute or controversy as to the construction of a Federal statute and the effect thereof upon the determination of which the final result of the action and the rights of the parties must ultimately depend.

C. A. L. Co. v. Donald, 225 U. S., 677.

Consolidated Turnpike Co. v. N. & O. V. R. Co., 228 U. S., 596.

Little v. Bowers, 134 U. S., 547.

McClain v. Ice Mining, 178 U. S., 139.

This rule of construction of Section 237 of the Judicial Code is by analogy sustained by cases from this court construing Section 28 of the Judicial Code which gives the Federal Courts jurisdiction of cases removed from State courts in suits

> *"arising under the Constitution or laws of the United States."*
>
> *Western Union Tel. Co. v. Ann Arbor R. Co.,* 178 U. S., 239.
>
> *Shoshone Mining Co. v. Rutter,* 177 U. S., 505.
>
> *Defiance Water Co. v. Defiance,* 191 U. S., 184.

In these removal cases a similar rule is applied in determining the *scope* of the jurisdiction of the Federal courts.

Applying the foregoing rule for the construction of the *scope* of Section 237 of the Judicial Code to the case at bar, it follows that, since, as heretofore pointed out, the result in the case at bar,—that is to say, the judgment,—must be the same under the Federal statute as under the Wisconsin statute, upon the undisputed facts, including the evidence offered by the company, received and finally rejected, and the findings of the jury, which cover all of the disputed facts, there is in the case at bar no *real or substantial dispute or controversy as to the construction of a Federal statute and the effect thereof, upon the determination of which the final result of the action and the rights of the parties*

must ultimately depend, and that therefore, this court has no jurisdiction.

This rule governing *jurisdiction* of this Court under Section 237 of the Judicial Code, to the effect that there must be a real or substantial dispute or controversy of the character just stated in the phraseology in italics, is well illustrated and sustained in a long line of cases from this court which, it is respectfully submitted, are in point with the case at bar, and which lay down well-settled, familiar elementary principles—the mere statement of which is sufficient, as follows: that the decision of the Federal question must be *material* and *necessary* to and *controlling* in the decision of the case *and devoid of frivolousness;* that there must be an *affirmative* and *substantially unambiguous* showing that the decision assailed rested on the Federal question *alone* and that no other sufficient consideration also induced the conclusion of the State court; that if there is another and distinct ground beside the Federal ground upon which the judgment of the State court can be sustained, this court has no jurisdiction; that to give this court jurisdiction the decision of the State court must be actually against and in denial of some real and substantial right under a Federal statute; that if the State court has not actually in effect withheld a benefit under a Federal statute, this court will not entertain jurisdiction; that in determining the question of jurisdiction this court is not limited to a consideration of the decision of the State Court upon the Federal question only; but this Court may put its decision on other grounds; and that, if the decision of the State Court *was* or *might have been* based on two grounds, one involving a Federal question and the other involving a non-Federal

question, and the decision of the non-Federal question is based upon grounds sufficient and broad enough to sustain the judgment, without being based upon Federal grounds, this court has no jurisdiction. These principles of law are supported by so many decisions of this court and so uniformly, that it is necessary to cite but a few of the cases illustrating these principles.

E. L. Co. v. Pierce, No. 4 *Adv. Op. U. S. S. C.*, Jan. 15, 1915, p. 133.

Adams v. Russell, 229 U. S., 353.

Consolidated Turnpike Co. v. N. & O. V. R. Co., 228 U. S., 596.

Deming v. C. P. Co., 226 U. S., 103.

S. A. L. Ry. v. Duvall, 225 U. S., 477.

I. Ry. Co., v. Olathe, 222 U. S., 187.

Berea College v. Kentucky, 211 U. S., 45.

A. S. R. R. Co. v. German Nat. Bk., 207 U. S., 270.

Leathe v. Thomas, 207 U. S., 93.

Harrison v. Morton, 171 U. S., 38.

Chemical Bk. v. City Bank of Portage, 160 U. S., 646.

Mo. Pac. Ry. v. Fitzgerald, 160 U. S., 556.

R. R. Co. v. Central V. R. Co., 159 U. S., 630.

Eustis v. Bolles, 150 U. S., 361.

Hammond v. Johnston, 142 U. S., 73.

Johnson v. Risk, 137 U. S., 300.

De Saussure v. Gaillard, 127 U. S., 216.

Murdock v. City of Memphis, 87 U. S., 590, (20 Wall.)

Kennebec R. R. v. Portland R. R., 81 U. S., 23, (14 Wall.)

Gibson v. Chouteau, 75 U. S., 314, (8 Wall.)

In dismissing a writ of error to a state court for want of jurisdiction because the decision of the state court was held to be based upon non-Federal grounds although there were Federal grounds relied on in the case, this court used the following significant language in *I. Ry. Co. v. Olathe,* 222 U. S., 187 supra, at p. 190:

> "The judgment would have been the *same* had the resolution not been adopted at all. No effect whatever has been given to it by the state court and this court is without jurisdiction to review its judgment."

Since, as heretofore pointed out, the result of the case at bar must be the same under either the Federal law or the Wisconsin law, it follows that the facts of this case, under the view taken by the company, do not satisfy the requirements of these well-settled elementary, familiar principles.

On the other hand, it appears affirmatively, as pointed out in the statement of the case (ante. p. 11) that it is apparent that the Supreme Court of Wisconsin considered, had in mind, and appreciated that there were other questions in the case besides the federal question, and that the Supreme Court of Wisconsin considered, had in mind, and appreciated all of the questions in the case, including

the non-Federal question as to whether there were other grounds sufficient and broad enough in themselves to sustain the judgment of the trial court without deciding or necessarily relying upon the decision of the Federal question alone. The final conclusion of the Wisconsin Supreme Court made after discussion and decision of certain specific questions, including the Federal question, is most significant and is as follows:

> "There are no other *contentions* which require treatment.
>
> By the COURT: *Judgment affirmed.*"

This language of the Supreme Court of Wisconsin is, it is submitted, sufficient to indicate that the state court did decide the non-Federal question and, as pointed out, the decision of the non-Federal question is sufficient and broad enough to sustain the judgment of the state court irrespective of the decision of the Federal question.

Even if the Supreme Court of Wisconsin did not base its decision on the sufficiently broad non-Federal grounds, the result in this court must be the same for if the Wisconsin court could have based its decision on a non-Federal ground but did not do so, no injurious or prejudicial consequences have been visited upon the company by the final result in the state court.

The following language is quoted from the case of *Kennebec R. R. v. Portland R. R.*, 81 U. S., 23 at p. 26 (14 Wall.), which is a case which involves a Federal question as well as a non-Federal question:

> "Here is, therefore, a clear case of a *sufficient* ground on which the validity of the decree of the state court *could* rest even if it had been in error as to the effect of the

act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the state court, we cannot take jurisdiction, because we could not reverse the case *though the Federal question was decided, erroneously in the court below,* against the *plaintiff in error.*

The writ must, therefore, be DISMISSED FOR WANT OF JURISDICTION."

Even if the Wisconsin Supreme Court *had* not based and *could* not base its decision upon the non-Federal ground as well as the Federal ground it is respectfully submitted that there is no sound reason in principle now why this court *should* not base its decision on the non-Federal ground, irrespective of what the Wisconsin Supreme Court *did* or *could* have done with the non-Federal ground in the case. This court is not limited to a consideration of the decision of the state court based upon Federal grounds, but, on the contrary, this court will inquire into and base its decision upon non-Federal grounds if there are such in the case and they are sufficient and broad enough to sustain the judgment of the state court.

Florida v. Croom, 226 U. S., 309.

G. C. & S. F. Ry. v. Dennis, 224 U. S., 503.

2nd. Even if this court does entertain jurisdiction, it is not sufficiently clear that the error complained of (if error) has worked *prejudice* to the *substantial* rights of the company to such an extent as will *require* reversal.

Facts.

This branch of the argument is based upon the same facts and assumptions of fact as those set

forth in the previous branch of the argument, subdivision B. of the 1st part of the argument.

Application of Law to Facts.

The rule is well settled that this court will not reverse a judgment of a state court upon a writ of error unless it is made to appear affirmatively, clearly and conclusively, and the contentions advanced are not frivolous, that error has been committed by the state court to the *prejudice* of the *substantial* rights of the party complaining of error; and where the party complaining of error fails to make a showing satisfying fully the requirements of this rule of law, the judgment of the state court will be *affirmed*. There is an abundance of authority from this court illustrating and sustaining this rule, among which are the following cases:

S. R. Co. v. Gadd, 233 U. S., 572.

S. A. L. Ry. v. Moore, 228 U. S., 433.

Holmes v. Goldsmith, 147 U. S., 150.

Lancaster v. Collins, 115 U. S., 222.

Jenkins, Assignee, v. Loewenthal, 110 U. S., 222.

The "Wanata," 95 U. S., 600.

Murdock v. City of Memphis, 20 Wall., 590.

This rule, in its fullest scope, has been applied to cases, such as the case at bar, involving *the exclusion of evidence only.*

Hornbuckle v. Stafford, 111 U. S., 389.

Cannon v. Pratt, 99 U. S., 619.

Gregg v. Moss, 14 Wall., 564.

In a case involving the Federal Act in question in the case at bar, it was held squarely that there was *no prejudice* to the *substantial rights* of the railroad company where it appeared upon the *whole record* that the result, that is to say, the judgment, would be the same under the law of Louisiana as under the Federal Act.

La Casse v. N. O. T. & M. R. Co., 64 So. (La.) 1012, infra.

It is most significant that in the case at bar, the learned counsel for the company has wholly failed to point out in his brief any respect in which *prejudice* of any kind to the *substantial* or other rights of the railroad company has been worked in the case at bar. The learned counsel has wholly failed to even suggest the possibility of *prejudice* or *injury* to any of the rights of the company.

Where it appears *affirmatively upon the whole record*, as it does appear in the case at bar and as has been heretofore pointed *out* that there has been no error committed which is *prejudicial* to the *substantial* rights of the company, every presumption of error that might, by any possibility arise, is entirely overcome.

S. A. L. Ry. v. Duvall, 225 U. S., p. 477.

This court has held that if the court can *"find nothing giving rise to a clear conviction on" its "part that error has resulted from the action of the courts below"* the judgment of the lower courts will be affirmed.

Seaboard Air Line Ry. v. Moore, 228 U. S., p. 433.

C. J. Ry. Co. v. King, 222 U. S., p. 222.

It is desired to place *emphasis* on this rule before entering on the next, the 3rd, branch of the argument.

3rd. The Supreme Court of Wisconsin did not err in affirming the decision of the trial court, refusing to grant a new trial because of error in the exclusion of the testimony pertaining to interstate commerce offered by the company.

Inadequacy of Assignment and Specification of Errors.

This is the only contention touched upon in the Railway Company's Brief (C. B. 11). The affirmative of this contention raises the only question which can be raised involving the construction or application of a Federal Statute; and this question cannot be enlarged or changed in any way by Counsel's assignment of errors, or by his specification of errors. If counsel's assignment of errors (T. 2-3) or specification of errors (Company's Brief pp. 10-11.) must be or is to be construed so as to enlarge or change the question thus involved, they are helpless in so far as they work an enlargement or change in this question and to the extent of such enlargement or change they cannot be reviewed by this court.

> "It is equally well settled that the contention made and passed upon in the state court cannot be enlarged by assignments of error made to bring the case to this court. This proposition is too well settled to need discussion." (Numerous cases cited.)

Cleveland & P. R. Co. v. Cleveland, 59 U. S. Supreme Court, 21, (U. S. Supreme

Court Advance Opinions, No. 2, Dec. 15, 1914.)

No error is assigned because of the striking out of the testimony. (T. 2-3.)

Questions raised by the plaintiff in error are required to be covered by the assignment of errors.

Revised Statutes, Sec. 999.

Green County v. Thomas' Executor, 211 U. S. 598.

> "When the error alleged is to the * * * * rejection of evidence, the specification shall quote the full substance of the evidence * * * * rejected." (Sub. Sect. 2, Sect. 2, Rule 21 of this court.)
>
> "And errors not specified according to the rule will be disregarded; but the court at its option may notice a plain error not assigned or specified." (Sect. 4, Rule 21 of this court.)

It is observed that the specification of error contained in the Company's Brief (T. 10-11.) does not "quote the full substance of the Evidence * * * * rejected" as required by the rule.

That there is no "plain error" in the record is pointed out herein.

Facts.

All of the *admitted* facts which bear in any way upon the question of interstate commerce are undisputed.

Gray's *principal* and *primary* duty as alleged in the complaint and *admitted by the company's answer*, was to receive engines delivered to him at the cinder pit in the Antigo yards, after they had wholly completed their runs and hostle them.

His duty with respect to the hostling of an engine consisted of driving it on to the cinder pit, to have the fire knocked out of it, then driving it to the coal shed to have coal put in the tender, then driving it to the water-tank to have water put in it, then driving it to the wood pile to have it furnished with wood, then driving it to the turn table at the round house and then driving it in to the round house and leaving it there to remain until it was taken out by some other engineer on another run.

In the hostling of an engine, Gray merely drove or operated the engine and others did the other work required in connection with the hostling of the engine.

His duties were all performed on that portion of the cinder pit track between the cinder pit and the round house. (T. 12-13, 16-17, 65, 79-80, 45-46.)

There is no proof whatever in support of the allegations of the complaint to the effect that Gray drove the engines in switching cars about the yards or that he caused water and steam to be discharged from the engines into the blow-off box. The statements to the contrary in the Company's Brief are erroneous. (C. B. 3.)

Apparently all duties performed by Gray other than the hostling of engines were merely incidental to his *principal* and *primary* duty of hostling engines in that portion of the yards referred to.

There were 30 engines hostled at that point every 24 hours and half of this number were hostled by Gray with the aid of his assistant. (T. 159.)

A "yard" is defined in the Company's Rule Book as follows:

> "A system of tracks within defined limits provided for the making up of trains, storing

of cars and other purposes, over which movements not authorized by time table or by train order may be made, subject to prescribed signals and regulations." (T. 149.)

Gray went to work on the day of the injury at 6 a. m. He was required to be on duty from 6 a. m. to 6 p. m. (T. 78-79.) He was injured shortly before 10 a. m. (T. 66.)

He had hostled three or four engines on that day previous to his injury. (T. 65, 79-80, 183.)

After hostling these engines, he left the Company's yards and went up town at about 8:15 a. m. (T. 81-82, 212.) to the Company's depot for the purpose of getting his pay check (T. 84, 212.), and for the further purpose of getting it and the pay check of one of the other engineer's cashed. He got the other engineer's check cashed at the grocery store of the City Treasurer across the Railway tracks from the depot. The grocer did not have money enough to cash Gray's check also and Gray went into a saloon just across the street from the grocery store to get it cashed. He was unable to get it cashed there. He purchased a glass of brandy and went directly back to the round house. He was gone about 50 minutes (T. 85-89.) He remained at the round house about 35 minutes, spending part of the time in the toilet room and part of it loitering in the engineer's room. He started from the round house to go back to his rest room and when he got to the sand house on his way to the rest room, he noticed smoke, steam and gas arising from the cinder pit and it occurred to him to go over to the cinder pit to see if the cinder pit man was putting water on the coals in the cinder pit. (T. 90, 67.)

When he got to the cinder pit after returning from getting his check, attempting to get it cashed, etc., going to the round house, thence to his rest room by way of the sand house, he said nothing whatever to the cinder pit man and did nothing with reference to him or the cinder pit but to *merely look* at the cinder pit man for a moment and then he immediately started to walk back to his rest room. (T. 67.)

He had given no directions to the cinder pit man with reference to wetting down the cinders subsequently to going to the depot to get his check and get it cashed. (T. 91-93, 95-97, 102.)

It was *primarily* the duty of the cinder pit man *and not Gray's* duty to keep the cinders in the pit wet down by throwing water on them. (T. 95.)

We quote from Gray's testimony as follows:

> "Q. Then when you started back, what route did you take?
>
> A. I took the route between the coal shed and the west rail.
>
> Q. Was that the usual way?
>
> A. Yes, I have walked there thousands of times.
>
> Q. As you walked back, state whether or not you were enveloped in this vapor and steam and smoke?
>
> A. I was completely enveloped.
>
> Q. Couldn't see your way?
>
> A. No sir.
>
> Q. *Where were you going?*
>
> A. *I was going to the shanty.*
>
> Q. *What for?*
>
> A. *To stay there until there was work for me.*

Q. What would be with an engine room in?

A. I'm sir.

Q. How did you gauge your way?

A. I gauged my way along the coal shed. Along the stringers of the coal shed—I guided my way with them.

Q. How did you know when the danger was?

A. I had to guess at it.

Q. Go on and tell what happened and how it happened and what you did.

A. I got down about, in my judgment, in front of the danger, and the steam was so thick I couldn't see my hand in front of me, and I stopped and listened for an engine and I couldn't hear any. I could hear a noise that water would make on hot cinders by pouring water on.

Q. What sort of a noise did it make?

A. My explanation of that would be, I guess everybody must be done it, it would be similar something to throwing a can of water or a pail of water on a pile of hot fire. It would make about that noise.

Q. Go ahead and tell us what you did?

A. I listened and couldn't hear nothing and I made up my mind that everything was clear and I raised my leg to make a step across the track and I got hit.

Q. Got hit by what?

A. That engine.

Q. Knew's engine?

A. Yes sir, well, that is, I didn't know at the time whose engine it was or who was running it.

Q. What happened to you?

A. I got hit in the face and I fell against the dust with my shoulders and the back of my head and I fell to the ground.

Q. Was it the first stroke of the engine that threw you against the shed?

A. Yes sir.

Q. And when you fell to the ground what happened?

A. I rolled over this way (indicating how) back towards the shed to get my legs and arm out of the way of the wheels and something, I should judge it was one of the big oil hose of the tank that caught me in the back about a little above my ribs and about my hips and it rolled me." (T. 67-68.)

The above testimony follows close upon the testimony quoted toward the top of page 5 of the Company's Brief.

"Q. *As I understand it you were coming back to the shanty simply to wait for that purpose until another engine came along?*

A. Yes sir." (T. 114.)

The two photographs and the map opposite page 280, 284 respectively of the transcript, assist materially in illustrating and explaining this testimony.

When Gray got to his rest room just after being injured, his assistant was there resting. There were no engines to be hostled or other work to be done then. His assistant had been in the rest room doing nothing for about 2 hours (T. 50.) Neither Gray nor any one else had hostled any engines during this time. (T. 81, 109.)

There is not a scintilla of evidence that the next engine which Gray expected to hostle, if he had not been injured, was an engine used in interstate commerce.

In fact, the next engine that was hostled was the engine that struck Gray and that engine was hostled by his assistant. (T. 53.)

Gray did not even know at the time he was injured that the engine which struck him was in the yards to be hostled. (T. 93, 97-98.)

There is not a scintilla of evidence in the record that Gray ever hostled an interstate engine after he was injured. So far as the record shows, all of the interstate commerce engines might have been hostled by Gray's assistant or they might have been hostled by the hostler and his assistant on duty at night.

There is not a scintilla of evidence that this engine had ever been or would ever be engaged in interstate commerce.

On the other hand it does appear affirmatively that this engine, which struck Gray, arrived at the yards at Antigo, Wisconsin, that morning, after being driven from either Fond du Lac or Green Bay (T. 26, 220.), both of which are in the same state.

There is not a scintilla of evidence that Gray had hostled an interstate commerce engine on that morning previous to his injury or at any other time.

On the other hand, there is affirmative testimony to the effect that all of the engines which Gray hostled previous to his injury on that morning, came to the yards in Antigo from other places in the same state. (T. 59, 65.)

There is no unambiguous, positive evidence in the record that this cinder pit or this cinder pit track was at the time of the injury, had been, would be or has been since used in interstate commerce by actually running engines over it or otherwise.

Referring to the map opposite page 284 of the transcript, it appears that this cinder pit track is one mere sidetrack among a large number of side tracks.

There is no unambiguous, positive evidence in the record that any of the engines which passed over this cinder pit or cinder pit track had been, was being, would be or has been used in interstate commerce.

So far as the evidence shows, all of the interstate commerce engines might have been taken into the round house from the south over the other track just east of the sand house, etc., or they might have been taken into the round house from the north over the two tracks which lead into the round house from that direction; and so far as the evidence shows, all of the interstate commerce engines might have been hostled in the round house or at some other point in the yards in question or at some other yards.

It does appear affirmatively that Antigo and the Antigo yards are on the Ashland Division of the Company's Railway Lines and that all of the cities and villages enumerated as being on this division are in the state of Wisconsin and that the foreman of the Antigo round house is subordinate to the foreman of this division. (T. 156, 166, 175.)

Gray was not upon a train or any part thereof passing between two states at the time of the injury, nor running an engine or train between two states. He was not upon a railway track connecting two states or extending between two states. He was not upon a railway track over which trains or cars containing interstate commerce were ever hauled in passing between two states. He was walking along beside a side track that did not ex-

tend between two states and over which interstate commerce was not hauled between two states. He had not come from operating a car or engine engaged in interstate commerce. He had no particular engine or car in mind that he expected to take charge of or operate, much less a particular engine or car actually engaged in interstate commerce. His duty never required him to haul commerce between two states or to run an engine in passing between two states. He was an engine *hostler*. His duty required him merely to take charge of engines after their runs had been completed for the purpose of driving or operating them between the cinder pit and the round house while the ashes were being emptied from them and while coal, wood and water were being put in them. When these things were done, he delivered them at the round house, not for the purpose of having them used immediately in hauling interstate commerce or any other commerce, but for the purpose of having them remain there, to be cooled off, wiped, repaired, etc., before they were taken out to haul any kind of commerce. At the time he was injured he was not even doing these things. He was simply proceeding to his customary waiting place to await further instructions from his superiors, or those who might call upon him to perform any of his duties. It was not shown that if he had gotten to his waiting place in safety he would have been called upon to dispatch, in the usual way, Kane's engine or any particular engine that might have been engaged in interstate commerce. If he had gotten to his waiting place safely he might have been called to the round house to perform some duty that had to do only with intrastate commerce, or that had nothing to do with any kind of com-

merce. Rock, his assistant, did have entire charge of the dispatching of Kane's engine. It was immaterial to plaintiff for the purpose of performing his duty as to whether any engine had ever engaged in interstate commerce or was ever to engage in interstate commerce. The question of interstate commerce had no bearing upon and no substantial relation to his duty, or to the manner in which he performed it.

There was no allegation of interstate commerce in the complaint. (T. 11-15.)

Neither was there any allegation of interstate commerce in the Company's answer (T. 15-18). The answer is verified by the learned counsel for the Company under oath. (T. 18-19.)

It is apparent that the learned counsel for the Company did not have sufficient basis of fact after an investigation, to assert by way of allegation under oath that facts existed which would bring the case within the purview of the Federal Statute because of the existence of interstate commerce.

On the other hand, the Company in its answer alleged affirmatively by way of defense that the plaintiff had failed to commence his action or give a notice of injury as required by the Wisconsin Statutes (T. 18.), thereby indicating the conviction on the part of the Company and its learned counsel that interstate commerce was not in any way involved.

This was the state of the record when counsel for the Company offered, as heretofore pointed out and set forth, the testimony pertaining to interstate commerce which was stricken out and this brings us to the question as to whether there was error in the decision of the supreme court of Wisconsin in

affirming the decision of the trial court in so far as that decision eliminated this testimony.

There was no dispute in or about the testimony which was offered, received subject to objection, and finally rejected, and the only element of proof added by the offer is that the Company was at the time an interstate railroad; it merely mentions in a general and rather ambiguous way the hostling of engines *"near"* and *"at* this round house." (T. 236-238.)

Application of Law to Facts.

THE STRIKING OUT OF THE TESTIMONY INVOLVED MERELY A FINDING OF FACT ON UNDISPUTED EVIDENCE, WHICH THIS COURT WILL NOT REVIEW OR DISTURB.

As heretofore pointed out, since all of the evidence in any way pertaining to interstate commerce, including the part rejected, is *undisputed, any finding of fact* with reference to the same, *was for the court and not for the jury* (ante p. 18); in striking out the testimony after it was received subject to objection, the court, *in effect,* at least, made a *mere finding of fact* to the effect that the rejected evidence, considered with the other undisputed evidence on this question, was not sufficient to establish that Gray at the time of his injury was engaged in a *task* of interstate commerce; *and this Court upon a writ of error will not review or disturb such finding of fact* (ante p. 18).

REASONING OF SUPREME COURT OF WISCONSIN.

In holding that the trial court committed no error in ultimately striking out the testimony which was offered by the Company, the Supreme Court of Wisconsin said: (Italics are the author's.)

The complaint does not allege that the defendant was engaged in interstate commerce or that the engine in question had been handling an interstate train, but simply that the defendant was operating trains and was carrying passengers and freight for hire between Antigo and other cities and villages in Wisconsin; neither did the plaintiff's evidence show that the defendant was transacting an interstate business. When the defendant took the case, however, it offered to show that it and its trains, engines and employees were engaged in hauling cars of freight continuously over this line between points in Illinois, Michigan and Wisconsin at and prior to the time of the accident; that the engines which were being dispatched at this round house at the time in question were making trips through Michigan to Ashland, making connections with the Watersmeet branch; that the engines running south wouldn't run outside the state; that those going and coming from the south handled refrigerator cars from Chicago. *No offer was made to show that the engine in question had been hauling an interstate train or interstate freight, nor that all the engines dispatched at this round house hauled interstate freight or interstate trains.* Part of this testimony was received against objection, but ultimately it was all stricken out, and so the question whether the federal employers' liability act controlled the present case was eliminated from the case.

An attempt is made by the respondent to justify this ruling on the ground that the testimony was incompetent and immaterial because there is no claim made in the answer that the plaintiff was employed in interstate commerce at the time of his injury. We should be slow to hold to so strict and technical a rule. The statutes of the United States are the law of the land, and not like

the statutes of our sister states which must be pleaded and proven in order to be available. Furthermore, the fact that the great railroad systems of the state are continuously engaged in both kinds of commerce must, we think, be so well known as to be matter of common knowledge. *We do not find it necessary to decide this question, however, as we are of opinion that the ruling was right on the merits.* As it was pointed out in recent case of Ruck v. C. M. & St. P. Ry. Co. (present term, 140 N. W. Rep., 1074), *it is necessary in order to bring a case within the federal act not only that the employer be engaged in interstate commerce, but that the injured employee shall suffer his injury "while he is employed" in interstate commerce.* Taking care of an engine after it has completed its run and preparing it for the round house seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply repairing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce. Ruck v. C. M. & St. P. Ry. Co. (supra).

We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff at the time of the accident here was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. Now it may perhaps be correctly held (though we do not decide the question) that a man whose day is spent in dispatching engines all of which are engaged in interstate commerce is in legal effect employed in interstate during the whole day and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; *but if, on the other hand, part of the engines dispatched be engaged in interstate*

business and part in local or intrastate business, we are unable to see how it could be logically said that he was "employed in interstate commerce" all day or during his intervals of leisure. In the present case, as we have seen, there was no offer to show that all the engines dispatched daily by the plaintiff were engaged in interstate commerce. As said before in this opinion, we think it must be considered a matter of common knowledge that the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little, if any, further than this. It was noticeably guarded and indefinite in its purport; every word of it might be admitted to be true and yet it would not be shown that all the engines dispatched at this round house by the plaintiff were engaged in interstate business, nor even that the engine in question had been so engaged. The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish the fact that the plaintiff's entire work consisted of the dispatching of engines engaged in interstate commerce. *Error must appear affirmatively, it is not to be presumed"* (T. 290-292).

It appears that the supreme court of Wisconsin held that in order to bring an employee within the purview of the Federal Employers' Liability Act, two things are essential:—

1st—The Railroad Company must "be engaged in interstate commerce" generally at the time of the plaintiff's injury.

2nd—"The injured employee shall suffer his injury 'while he is employed' in interstate commerce."

The *necessity* of this second requisite, in addition to the first, is *apparently* what the trial court had in mind in assigning its reason for striking out the testimony in question. (T. 236-237; C. B. 7.)

CASES RELIED ON.

That these two requisites must be present to bring a case within the provisions of this federal act is well settled by a decision of this court.

Ill. Cent. R. R. v. Behrens, 233 U. S., 473 at 478.

It is also apparent that the supreme court of Wisconsin held that the evidence offered by the Company, received subject to objection and finally rejected, merely established that the first requisite of the federal act was satisfied in the case at bar; and that the second requisite of the federal act was not satisfied by the evidence offered and rejected taken together with all of the evidence that was received.

From the *Behrens* case and the decision of the Supreme Court of Wisconsin in the case at bar, we readily derive the rule that if either of these two requisites are wanting, the Federal act has no application and its provisions become wholly immaterial and the only question before the court upon this branch of the argument is whether either of these two requisites are wanting in the case at bar under all of the proof, including the part rejected.

We respectfully submit that both of these cases are identical in principle and analogous in fact and that the decision of this court in the *Behrens* case rules the case at bar.

We quote from the decision in the *Behrens* case as follows: (Italics are the author's.)

"The facts shown in the certificate are these: The intestate was in the service of the railroad company as a member of a crew attached to a switch engine *operated exclusively within the City of New Orleans.* He was the *fireman* and came to his death, while at his *post of duty,* through a head-on collision. The general work of the crew consisted in moving cars from one point to another within the city *over the Company's tracks* and other *connecting* tracks. Sometimes the cars were loaded, at other times empty, and at still other times some were loaded and others empty. When loaded the freight in them was at times destined from within to without the State or vice versa, at other times was moving only between points within the State, and at still other times was of both classes. When the cars were empty the purpose was usually to take them where they were to be loaded or away from where they had been unloaded. And oftentimes, following the movement of cars, loaded or empty, to a given point, other cars were gathered up and taken or started elsewhere. *In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other.* At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, *and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the State.* The question of law upon which the Circuit Court of Appeals desires instruction is, whether upon these facts it can be said that the intestate at the time of his fatal injury was employed in interstate commerce within the meaning of the Employers' Liability Act. * * *

We entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its *general* work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. * * *

Passing from the question of *power* to that of its *exercise*, we find that the controlling provision in the act of April 22, 1908, reads as follows: 'Section 1. That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, *works, boats, wharves,* or other equipment.' Giving to the words '*suffering injury while he is employed by such carrier in such commerce*' their natural meaning, as we think must be done, *it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce.* * * *

The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? (Citing the *Pedersen, Scale* and *Zachary* cases relied upon in the company's brief.) * * *

Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a

> service in interstate commerce, and so the injury and resulting death were not within the statute. *That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.*" (233 U. S., 475 at 479-6.)

As stated by this court that *Bellevue* "expected upon the completion of that task to engage in another which would have been a part of interstate commerce is immaterial."

Likewise, if it were shown that Gray expected upon the completion of the thing that he was doing to engage in a task which would have been a part of interstate commerce, it would be immaterial.

Upon the question as to whether the amount requisite of the Federal Act is satisfied in the case at bar; but the case at bar is even more favorable to Gray than the *Bellevue* case because in the case at bar there is no proof or offer of proof whatever that Gray expected, then or thereafter, to engage in any task which would have been a part of interstate commerce.

We quote from *La Clare v. N. O. T. & M. R. Co.*, 64 So. (La.), 1913, supra, another *locative* case, aptly in point as follows:

> "He was employed by the defendant company in its round house at Kenner, La. His functions consisted in receiving the locomotives that came to the round house, taking care of them, and having them filled with water and steamed up, ready for use, when called for. While he was steaming up an oil burning locomotive, the crown sheet (which is the plate, or part, directly above the fire,

separating it from the water in the boiler) gave way, by reason of the downward pressure of the steam, and a sort of explosion resulted, by which the fire brands were lifted from their (fire?) and thrown out, and made to strike him and another man, and kill them. * * *

But we do not agree with defendant that this case thus comes under the Federal statute. For showing that it does, defendant relies exclusively upon the following testimony:

'Q. Where did this engine run? A. It worked all the way between Houston and New Orleans. It was one of the Sunset Route engines.' The Sunset is a Louisiana route. We do not understand this evidence to mean any more than that this locomotive, like any other locomotive of the defendant company, or any of its cars, might be used at some time or other in interstate commerce. Not that it was being so used at the time the deceased was attending to it. On the contrary, the evidence shows that its last run, which was on the preceding day, had been from another intrastate point to Houston. If the fact that a locomotive or a car might be used the next day, or whenever used, in interstate commerce, were sufficient to bring it actually at the time in use in that commerce, the effect would be that whenever a railroad did not confine itself to intrastate commerce, but engaged also in interstate commerce, every one of the employes would at all times be in interstate commerce when at their work.'

In the Behrens case it was argued, by counsel for Behrens' administratrix, in support of the contention that the facts brought the case within the provision of the federal act that:

'The general nature of the employment and not any specific isolated item of work must

fix the status of an employe." 233 U. S., 473 at 474.

But this court overruled this contention and held that

> "it is clear that Congress *intended* to confine its action to injuries occurring when *the particular service* in which the employe is engaged is a part of interstate commerce." (233 U. S., 473 at 478.)

In the first place Gray was not performing any *service*. He was not even engaged in *carrying* an article of any kind.

In the second place *the particular* thing which he was doing was *"walking back"* to his rest room to await the arrival of an engine to be hostled or the performance of some other work to be done, not knowing what it would be.

If, *as held in the Behrens case*, it was *immaterial* what *Behrens* expected to do after the completion of the thing that he was doing, then it logically follows that it was likewise *immaterial* what Behrens had been doing just before he commenced to do the thing that he was doing at the time of his injury. This court so held in deciding that it was *immaterial* that *Behrens* had been indiscriminately handling interstate commerce previous to his injury. That this is the law has also been held in another well reasoned decision, squarely in point citing the *Behrens* case,

> *Shanks v. D. L. & W. R. Co.*, 148 N. Y. Supplement (Supt. Ct.) 1034.

We quote from pp. 1035-56 of this decision as follows: (Italics are the author's.)

"Plaintiff had *previously worked repairing parts of locomotives,* but at this time, and on the day before, he had been assigned to the wheelwright work of attending to the shop machines and of keeping them in repair * * * * *Repairs at these shops were on any locomotives indiscriminately, regardless of whether they ran in interstate or intrastate traffic.* The remedy by the federal statute is *"to any person suffering injury while he is employed by such carrier in such commerce." These strict limitations are so as not to trench on the rights of the states. Congress can legislate concerning the mutual rights and liabilities of master and servant, when both are actually engaged in interstate commerce. Emp. Liability Cases,* 207 U. S., 463, 28 Sup. Ct., 141; 52 L. Ed., 297.

The employe must be himself engaged in commerce, or his work must be a part of interstate commerce under federal protection, *but this is not his general line of work,* but *"the particular service in which the employe is then engaged."* The test declared by the Supreme Court of the United States is the "nature of the work being done at the time of the injury," not what the employe expects to do after the completion of his task. * * * *

How carefully the courts *discriminate* is seen as to the crew of a switch engine, which sometimes moves local cars, and again cars carrying freight for points beyond the State; the men working *indiscriminately* on both kinds of traffic. But these employes are not thereby held to be engaged in interstate commerce; on the contrary, such switching train work, though in constant change, is to be distinguished according to its character at *the time* of the employe's injury, and the liabilities by the federal act are applied only to the handling and movement of cars that are then

bound *to or from across state lines. Illinois Central R. R. Co. v. Behrens, supra.*"

The supreme court of Wisconsin held in this respect and its holding is sustained by the undisputed evidence as follows:

> *"We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff at the time of the accident here was walking back to his rest shanty and was doing nothing at all in the way of dispatching engines."* (T. 291.)

As heretofore pointed out, the evidence shows that Gray at the time of his injury was *"walking back"* to his rest room, there to await the arrival of an engine to be dispatched or the performance of some other duty without showing that such engine would be an interstate commerce engine or that such other duty would be a part of interstate commerce. His chief purpose and his primary object and his dominant idea were to get back to his rest room, there to remain at leisure and it may be for considerable time before any duty presented itself and without knowing just what duty would present itself or when it would present itself. From the moment that he turned his back upon the cinder pit man at the cinder pit to go back to his rest room and all of the way back, he was concerned with, absorbed in and engaged at *"walking back"* as found and decided by the supreme court of Wisconsin.

Since it is immaterial what he was doing before he started *"walking back"* it is immaterial that before he started to *"walk back"* he stood for a moment, glanced at and looked at the cinder pit

man at the cinder pit. The moment he turned his back upon the cinder pit man as he did and turned his face in the direction of the rest room, he wholly ceased to be engaged in looking at or glancing at the cinder pit man. The cinder pit man went completely out of his mind, because his mind then became engaged with *"walking back"* along the coal shed, between the coal shed and the track and in *gauging* his way as he went. The cinder pit man and his activity were no longer even within the range of Gray's vision because his vision was then obscured by the steam, smoke and gas.

Gray had in fact been *"walking back," gauging* his way to a point nearly 70 feet from the cinder pit man at the time that Gray was injured (T. 95.) and he had then completely severed all connections with the cinder pit man and had wholly completed the act of looking or glancing at the cinder pit man, and had commenced a wholly new act or task which was that of *"walking back," gauging* his way as he went to his rest room, with a view to ultimately giving his attention, thought and energy to the dispatching of an engine or the doing of some other task.

In the Behrens case it was held that the fact that Behrens had previous to the time of his injury been engaged in handling interstate commerce indiscriminately was immaterial, nowithstanding the fact that at the very moment that Behrens was injured he was actually upon and engaged in handling, as a locomotive fireman, an instrumentality of interstate commerce in the form of a locomotive engine which had been and would be as it appeared affirmatively from the evidence in the Behrens case, engaged "indiscriminately" in hauling cars with interstate freight, and notwithstanding the fact that it must

be inferred, at least from a reading of the Behrens case, that Behrens as fireman was at the moment of his injury engaged in maintaining the efficiency of this instrumentality of interstate commerce which had been and was about to be used in hauling interstate cars by maintaining the fire, keeping up the steam, observing and guarding the engine and doing the other things that are ordinarily required to be done in maintaining a locomotive engine at a point of at least reasonable efficiency to the end that it may be used in the hauling of freight which freight, in the Behrens case, was interstate freight.

Certain it is that in addition to holding that the Railway Company must be engaged in interstate commerce and that the employee must be so engaged at the time of his injury, the Behrens case holds squarely that it must appear affirmatively and clearly where the evidence is undisputed, that the employee was engaged in interstate commerce at the time of his injury and that it is wholly immaterial whether he had been so engaged previously or whether he was expected to be so engaged immediately afterwards, or whether he was then upon an instrumentality of interstate commerce assisting in the handling of it and in the yards of an interstate commerce Railway Company.

This reasoning, all of which is sustained by the doctrine of the Behrens case, we respectfully submit disposes completely of what the learned counsel in his brief terms "the second aspect of Gray's employment." (C. B. 12.)

But there is another view of this so-called "second aspect of Gray's employment" which the learned counsel for the company seems to have overlooked. As heretofore pointed out, it is not affirmatively or clearly shown in the evidence, including that which

was rejected, that the side track which passed over the cinder pit had actually been, was or would be used in interstate commerce by having interstate engines or cars or traffic pass over it, or that the cinder pit had been, was or would be used in interstate commerce or that the cinder pit man had been, was or would be engaged in performing a duty of interstate commerce, or that the act of the cinder pit man in throwing the water to wet down the cinders as Gray looked or glanced at him momentarily, was an act of interstate commerce.

There is not a scintilla of evidence in the record admitted or rejected which shows that any specific engine, tender, car or employe had actually been or actually was or actually would be engaged in any specific act of interstate commerce. The burden of proof in this respect rested wholly upon the Railway Company and we respectfully submit that the Company has utterly failed to establish the affirmative of its contention in this respect.

This is the very thing which prompted the supreme court of Wisconsin speaking by its Chief justice to say as it did say in reference to the failure of the company's proof in this respect with some manifestation of criticism the following:

> *"It was noticeably guarded and indefinite in its purport;* every word of it might be admitted to be true and yet it would not be shown that all the engines dispatched at this round house by the plaintiff were engaged in interstate commerce, nor even that the engine in question had been so engaged." (T. 291.)

Therefore, we respectfully submit the decision of the supreme court of Wisconsin in so far as it held, as heretofore pointed out, that the evidence

rejected, taken together with the evidence received, did not establish affirmatively, clearly or otherwise that Gray at the time of his injury was engaged in doing a thing or an act or a task that was a part of interstate commerce sufficiently to satisfy the second requisite of the Federal Act within the doctrine of the Behrens case.

"But, of course, it (the power over interstate commerce conferred on Congress by Article 1, Sec. 1, Clauses 3 and 18 of the United States Constitution) does not extend to any matter or thing which does not have a *real or substantial* relation to some part of such commerce."

Second Employers' Liability cases, 223 U. S., 1.

Again on the same page of this case the Supreme Court of the United States has said that this power of Congress is subject

> "to the qualification that the particulars in which those relations are regulated must have a *real* or *substantial* connection with the interstate commerce in which the carriers or their employees are engaged."

We submit that Gray was not shown to be connected in any way with interstate commerce at the time of his injury under the most favorable view that can be taken of the facts from the standpoint of the company.

The Supreme Court of the United States in *Howard v. Ill. Central R. Co.*, 207 U. S., 463, at 498, in the decision holding the first Federal Railway Employers' Liability Act unconstitutional speaking by Chief Justice White, said:

> "Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such

> carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exhausted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again, the same road having shops for repairs, and, it may be for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest besides, the possibility of its being engaged in other independent enterprises."

The learned Counsel for the Railway Company must concede now that the Behrens case is in point because in the Company's brief filed in the Supreme Court of Wisconsin in the case at bar as appears from a reference to the official report of the case 153 Wisconsin 637 at 643, he cited *Behrens v. Ill. Cent. R. Co.*, 192 Federal, 581, and relied upon it and this is the report of the decision of the Behrens case made by the United States District Court (E. D. La.) wherein it was held that Behrens was within both of the requirements of the Federal Act and an examination of this decision of the District Court will show that the facts as reported in the decision are substantially the same as the facts stated in the certificate of the Circuit Court of Appeals certifying the Behrens case up to this Court for decision.

And it is most significant that counsel for the Railway Company, in his brief, passes by with an obscure reference, near the very end of his brief

(C. B. 15.), the *Behrens* decision, which is this court's most recent reported decision construing the Federal Act in its application to the case at bar, and in which the decision of the District Court is reversed, especially since he considered the case sufficiently close in point to justify his citation of the decision of the District Court and his reliance upon it in this case in the Supreme Court of Wisconsin.

Furthermore, the decision of this Court in the Behrens case is cited in the Railway Company's Brief in such a way that the casual reader, at least, might get the impression that the decision of this Court in the Behrens case supports the Company's contention, *while it squarely overrules its contention.*

It is interesting to note, too, that in the brief filed by the learned counsel for the Railway Company in this Court, the case of *Ruck v. C. M. & St. Paul Ry. Co.*, 153 Wis., 158, is assailed (C. B. 15.); he also cited and relied upon this Ruck case in the Supreme Court of Wisconsin in the case at bar as appears from a reference to 153 Wis., 637 at 643.

Furthermore, in his brief counsel for the Company puts emphasis upon the reference to the Ruck case made by the Supreme Court of Wisconsin in its decision of the case at bar (C. B. 9.) but an examination of the decision of the Supreme Court of Wisconsin in the case at bar discloses that it did not rest this decision upon the decision of the Ruck case and that what was said about the Ruck case is mere *dicta.*

Immediately after referring to the Ruck case the Supreme Court of Wisconsin proceeds to say:

> *"We think there is a stronger ground, however, upon which the ruling of the trial Court*

> *may be sustained.* It appears that the plaintiff at the time of the accident here was *"walking back"* to his rest shanty and was doing nothing at all in the way of dispatching engines." (T. 291.)

A little further on in the decision the Supreme Court of Wisconsin in referring to the Company's testimony which was stricken out goes on to say:

> *"As said before in this opinion we think it must be considered a matter of common knowledge that the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little if any further than this."* (T. 291.)

An examination of the testimony which was offered and rejected and which has heretofore been set forth fully (ante p. 6) will disclose that the holding of the Wisconsin Supreme Court in this respect and to the effect that the rejected testimony satisfied only the first requisite of the Federal Act, is correct.

Since only the first requisite of the Federal Act was satisfied by the rejected testimony and since the second requisite of the Federal Act was not satisfied by the rejected testimony considered in connection with the admitted testimony, the rejection of this testimony is wholly immaterial and harmless and without error.

An examination of the brief of counsel for the Company makes it apparent that these two wholly distinct requisites have been confused and that this rejected evidence which goes only to the first requisite has been confused with the requirements of

the proof necessary to establish the existence of the second requisite.

In his brief counsel for the Company argues that the State Courts including the Wisconsin Supreme Court "were groping around trying to find the light" at the time the case at bar was decided by the Wisconsin Supreme Court. This charge is not sustained. The Supreme Court of Wisconsin previous to this time had exhibited a high order of discrimination in construing the Federal Act.

> *Rowlands v. C. & N. W. Ry. Co.*, 149 Wis., 51; 135 N. W. 156.

The Wisconsin Court showed commendable discrimination in the case at bar in reaching the same result which this Court reached in the analogous Behrens case, notwithstanding an erroneous decision of the District Court.

The Wisconsin Supreme Court has shown similar discrimination in the case of *Graber v. D. S. S. & A. R.*, 150 N. W. (Wis.), 489, (Adv. R. Feb. 5, 1915), without impairing in any way the force of its decision in the case at bar.

It is likewise commendable that the Supreme Court passed over without decision the question of pleading raised in the case at bar and decided it upon broader grounds.

What the Wisconsin Supreme Court said to the effect that the proof offered and rejected should have tended to establish that Gray's entire work consisted of dispatching interstate commerce engines, (T. 291.) was unnecessary to the decision of the case and is therefore dicta; *it is sufficient to sustain the decision under the doctrine of the Behrens case that the rejected testimony fails to*

establish that Gray was engaged in a task of interstate commerce at the time of his injury.

Other cases illustrative of the limitations of the scope of the Federal Act which by analogy of principle support the contention that there was no error in rejecting the testimony offered by the Company because by it and all other evidence Gray was not shown to be employed in interstate commerce at the time of his injury are:

Connole v. N. & N. Ry. Co., 216 Fed., 823. (Citing Behrens Case.)

Thomas v. B. & M. R. R., 218 Fed., 143. (Citing Behrens Case.)

Bravis v. C. M. & St. P. Ry. Co., 217 Fed., 234. (C. C. A.)

Nordgard v. M. & N. Ry. Co., 211 Fed., 721.

Jackson v. C. M. & St. P. Ry. Co., 210 Fed., 495.

Feaster v. F. & R. Ry. Co., 197 Fed., 580.

Heibach v. Lehigh Valley R. Co., 197 Fed., 579.

Van Brimmer v. T. & P. Ry. Co., 190 Fed., 394.

Tsmura v. G. N. Ry. Co., 108 Pac. (Wash.), 774.

Purson v. N. Y. S. & W. R. Co., 85 Atl. (N. J. E. & A.), 233.

Wright v. C. R. I. & P. R. Co., 143 N. W. (Neb.), 220.

Meyers v. N. & W. Ry. Co., 78 S. E. (N. C.), 280.

S. R. Co. v. Murphy, 73 S. E. (Ga.), 1073.

G. H. & S. A. Ry. Co. v. Chojnacky, 163 S. W. (Texas C. A.), 1011.

Louisville & N. R. Co. v. Strange's Adm'x, 161 S. W. (Ky.), 239.

Voris v. C. M. & St. P. Ry. Co., 157 S. W. (K. C. C. A.), 665.

M. K. & T. Ry. Co. of T. v. Franzen, 150 S. W. (Texas C. A.), 201.

Cases Relied on by Company's Brief Distinguished.

An examination of all of the cases mentioned by counsel for the company except the *Behrens* case will disclose that they are readily distinguishable from the case at bar. They can be classified into 3 groups. The first is the group of *repair* cases.

In each of the cases in this first group in addition to *affirmative* proof that the railway company was an interstate railway engaged in interstate commerce, there was *affirmative* proof that the employe was actually engaged at the very moment of his injury in a specific act of *repairing* a specific instrumentality, or specific instrumentalities, which actually had been and would be used in interstate commerce, or which actually were being used in such commerce. This is the largest group, and these cases are as follows:

Pedersen case, 229 U. S., 146. (C. B. 15.)

Barlow v. Lehigh Railway Company, 143 N. Y. Supp., 1053. (C. B. 15.)

San Pedro Railway Co. v. Davide, 210 Fed., 870. (C. C. A.) (C. B. 15.)

[illegible] Case, [illegible] Fed., [illegible]. (C. C. A.) (C. [illegible] [illegible])

Missouri K. & T. Ry. v. [illegible] Co., [illegible] S. W., [illegible]. (C. [illegible] [illegible])

[illegible] v. Charleston Railway Company, [illegible] S. E., [illegible]. (C. [illegible] [illegible])

[illegible] v. Minneapolis & St. L. R. Co., [illegible] N. W., [illegible]. (C. [illegible] [illegible])

[illegible] v. Central Railway Company, [illegible] Fed., [illegible]; affirmed, [illegible] Fed., [illegible] (C. C. A.) (C. [illegible] [illegible])

[illegible] v. Illinois Central Railway Company, [illegible] S. W., [illegible]. (C. [illegible] [illegible])

[illegible] v. [illegible] Railway Company, [illegible] S. W., [illegible]. (C. [illegible] [illegible])

[illegible] v. Southern Pacific, [illegible] Fed., [illegible] (C. [illegible] [illegible])

In [illegible] v. [illegible] Co., [illegible] ([illegible]), [illegible], supra, the court said:

"The two decisions of the Supreme Court of the United States, supra, [illegible] [illegible] [illegible] interstate commerce."

The case of *Ruck v. C. M. & St. P. Ry. Co.*, 153 Wis., 158 (C. B. 15.) like the *Behrens* case holds against the contentions of counsel for the company; and if we were to concede for the sake of the argument that the decision is incorrect (a very debatable question at best) such concession would not reach the case at bar. It would merely classify the Ruck case with the Pederson and other *repair* cases; and as has been shown this court has already distinguished the *Pederson* case from the *Behrens* case and in other cases including nearly all of those relied on in this brief it is distinguished from other cases analagous in fact as well as principle to the case at bar.

In each of the cases in this second group, *in addition* to affirmative proof that the railway company was an interstate railway, engaged in interstate commerce, there was *affirmative* clear and conclusive proof that the *employe* was actually engaged at the very moment of his injury in preparing in a *specific* way, a *specific* instrumentality for immediate use in carrying traffic, on a *specific* trip, between *specific* points in different states. These cases are:

St. Louis, San Francisco & T. Ry. Co. v. Seale, 229 U. S., 248. (C. B. 13-14.)

Montgomery Southern Pacific Railway Company, 131 Pac., 507. (C. B. 12.)

I. C. R. Co. v. Nelson, 203 Fed., 951. (C. C. A.) (C. B. 13.)

Armbruster Case, 147 N. W., 338. (C. B. 15.)

Freeman, Receiver, v. Powell, 144 S. W., 1033. (C. B. 15.)

In each of the cases in the third group, *in addition* to affirmative proof that the railway company was an interstate railway, engaged in interstate commerce, there was affirmative proof that the *employe*, at the very moment of his injury, was in the act of doing and about to do a specific *task* having an *immediate* and a *real* and *substantial* relation to interstate commerce and calling for the *use* of a *specific instrumentality* of such commerce. These cases are:

Zachary Case, 232 U. S., 248. (C. B. 13, 15.)

Lamphere Case, 196 Fed., 336. (C. B. 13.)

Rentz Case, 162 S. W., 959. (C. B. 13.)

St. Louis & Southwestern Railway Company v. Brothers, 165 S. W., 488. (C. B. 13.)

Graber v. Duluth, South Shore & Atlantic Ry., 150 N. W., 489. (C. B. 15.)

Horton v. Oregon Navigation Co., 130 Pac., 897. (C. B. 16.)

Most of these cases in each and all these three groups are based on the Pedersen case.

Pedersen was *carrying* a sack of bolts about to be used immediately in the *repair* of an interstate track; Gray was *carrying* nothing and doing no work.

It is interesting to note that each of these three groups of cases relied on by counsel for the company is headed by one of the only other three cases, including the *Pedersen* case, involving the scope of the act, decided by this court, that all of these cases were decided previous to the *Behrens* case and

considered in the *Behrens* decision and that this court in the *Behrens* case distinguished them from the *Behrens* case.

It is respectfully submitted that the facts in the case at bar including those rejected do not answer the requirements of the doctrine of any of these three groups in respect to the second requirement of the Federal act.

Since the Federal act is in derogation of the common law it should be strictly construed.

> *St. L. I. M. & S. Ry. Co. v. Conley,* 187 Fed., 949, at 952.
>
> *Fulgham v. M. V. R. Co.,* 167 Fed., 660.

Furthermore, there is no mischief to be remedied, as suggested in the *Conley* case, by the application of the Federal act to the case at bar as the result as heretofore pointed out must be the same under either act.

The Supreme Court of Wisconsin did not err in affirming the rejection, by the trial court, of the testimony offered by the company.

4th. It is sufficiently apparent that the writ of error was sued out merely for delay to warrant this court in awarding Gray damages.

This branch of the argument is predicated, in part, upon the soundness of the argument advanced in either or all of the branches of the argument heretofore advanced.

Additional Facts.

In addition it is desired to point out that the company apparently did not have sufficient confidence in the contention that Gray was engaged

in interstate commerce at the time of his injury within the meaning of the Federal Act to warrant setting forth an allegation to this effect in its answer under oath, made after an investigation of the facts, as the essentials of good form, at least in pleading, required; that, the answer, on the contrary, contains an express allegation designed to bring the case within the Statute of Limitations of the State, thereby, by implication at least, conceding the applicability of the State statute to the exclusion of the Federal Act (T. 16-19); that the company's contention in this respect was not advanced until near the very end of the trial (T. 236); that the contention when advanced, was supported by an offer of proof that was, as found by the Supreme Court of Wisconsin, *"noticeably guarded and indefinite in its purport;"* that the company's contention in this respect is not presented in the assignment of errors here in the way that it was presented in the State Courts (T. 2-3, 289); that the specification of errors in the company's brief does not quote the full substance of the evidence (Company's Brief pp. 10-11), the rejection of which must be relied on in support of the company's contention in this respect as required by Rule 21 of this court; that some of the company's assignments of error in this court (T. 2-3) are wholly abandoned in the company's brief. (Company's Brief 10-11); that a lengthy delay has actually ensued; that nearly two years have elapsed since the decision of the Supreme Court of Wisconsin (T. 286); that considerably more than four years shall have elapsed from the date of Gray's injury (T. 64) to the time of the collection of his judgment; and that Gray's injuries are of a most serious and permanent character.

With respect to the seriousness and permanency of his injuries, the Supreme Court of Wisconsin found as follows:

> "IV. *It appears from the evidence that the plaintiff received severe bruises, wounds and contusions on the head, body and hips at the time of the accident, that several ribs were broken and that he was in bed two weeks; that his left arm is still partially paralyzed, that he suffers pain in the left arm and shoulder practically all the time, that he is incapacitated for physical labor, is afflicted with occasional spells of dizziness, and that his average weight is reduced from about 160 pounds to about 130 pounds. The injury was suffered in January, 1911; he was examined by Doctor Connell of Fond du Lac in May, 1912, and it was then found for the first time by examination of his sputum that he had incipient consumption or tuberculosis of the lungs. He testified himself that he had had night sweats and hemorrhages.* * * * *
>
> *There was medical testimony to the effect that an injury such as plaintiff received is likely to induce or incite tuberculosis by reducing the natural resistance of the patient, lowering his vitality and putting him in a condition whereby he is unable to withstand infection.* * * * *
>
> *In the present case, however, there was other testimony besides the general testimony above referred to. Dr. E. J. Donohue, who treated the plaintiff for his injuries from the day of the accident in January, 1911, until some time in April following, and gave him a thorough physical examination, including an examination of the sputum, about two weeks before the trial in July, 1912, testified directly as follows: . . . . . He testified positively that in his opinion the tubercular condition was the result of the injury re-*

ceived. We are unable to say that this testimony is beyond the proper scope of expert medical testimony, and unless we can say that, it seems certain that we cannot hold that a finding that the tuberculosis condition was caused by the accident is purely conjectural." (T. 292-3.)

The findings of the Supreme Court of Wisconsin in this respect are amply sustained by the proof (68-78, 114-138, 143-144, 152-3), and the correctness of this proof was conceded by the company, the concession being manifested by the failure of the company to offer any proof whatever in rebuttal.

Because of the seriousness and permanency of Gray's injuries, resulting in the destruction of his earning capacity, the delay caused by the Writ of Error in the case at bar has worked an unusual hardship upon Gray.

Application of Law to Facts.

It is respectfully submitted that if damages are awarded, they should be in the full amount as specified by the rule of this court and the authority of the statute.

RULE 23—Revised Statutes Sect. 1010.

These damages may be awarded whether the writ of error be dismissed or the judgment be affirmed.

Deming v. Carlisle, 226 U. S., 102.

Summary.

To summarize, it has been pointed out:

1st—That this court has no jurisdiction,

(A) Because the court has not acquired jurisdiction if the deputy clerk, who signed and issued the writ, has not been clothed by Congress with authority to sign or issue a writ of error from this court to a state court, and such defect is not susceptible of amendment, and

(B) Because the Federal question in this case is not sufficiently necessary, controlling and material to the decision of the case to render it sufficiently devoid of frivolousness to sustain jurisdiction;

2nd—That if this court does entertain jurisdiction, it is not sufficiently clear that the error complained of (if error), the error being assumed without being conceded solely for the purpose of argument, has worked prejudice to the substantial rights of the company to such an extent as will require reversal;

3rd—*That, contrary to this assumption, thus indulged in solely for the purposes of the argument, the Supreme Court of Wisconsin did not err in affirming the decision of the trial court refusing to grant a new trial because of error in the rejection of the testimony pertaining to interstate commerce offered by the company, received and subsequently stricken out;* and

4th—That Gray is entitled to damages in this court in the full amount allowable by the rule of this court, as authorized by the statute.

Furthermore, a careful examination of *the entire record*, from cover to cover, *demonstrates that substantial justice has been done* by the judgments of the state courts, in the case at bar.

Conclusion.

It is therefore respectfully submitted that, upon the whole record, including the testimony stricken out, and in view of the provisions of the Federal and Wisconsin Railway Employers' Liability Acts, this writ of error should be dismissed, or that, in the alternative, the judgment of the Supreme Court of Wisconsin, affirming the judgment of the Municipal Court of Outagamie County, here in question, should be affirmed by this Court.

STEPHEN J. McMAHON,

Attorney for Defendant in Error,
William H. Gray.

APPENDIX.

Federal Employers' Liability Act.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"SECTION 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow, or husband and children of such employe; and, if none, then of such employe's parents;

Wisconsin Railway Employers' Liability Act.

"*Crippling or Death Damages.* SECTION 1816. Every railroad company shall be liable for damages for all injuries whether resulting in death or not, sustained by any of its employes, subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employe:

Roadbed and Machinery Defects. (1) When such injury is caused by a defect in any locomotive, engine, car, rail, roadbed, machinery or appliance used by its employes in and about the business of their employment.

Fellow Employes' Negligence. (2) When such injury shall have been sustained by any officer, agent, servant or employe of such company, while engaged in the line of his duty as such and which such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent, servant or employe of such company, in the discharge of, or by reason of failure to discharge his duties as such.

Court's Questions to Jury. (3) In every action to recover for such injury the court shall submit to the jury the following questions: First, whether the company, or any other officer, agent, servant or employe other than the person injured was guilty of negligence directly contributing to the injury; second, if that question is answered in the affirmative, whether the person injured was guilty of any negligence which directly contributed to the injury; third, if that question is answered in the affirmative, whether the negligence of the party so injured

and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employe, or where such injuries have resulted in death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; *Provided*, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

"SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

was slighter or greater as a contributing cause to the injury than that of the company, or any officer, agent, servant or employe other than the person so injured; and such other questions as may be necessary.

Comparative Negligence. (4) In all cases where the jury shall find that the negligence of the company, or any officer, agent, servant or employe of such company, was greater than the negligence of the employe so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover, and the negligence, if any, of the employe so injured shall be no bar to such recovery.

Question for Jury. (5) In all cases under this section the question of negligence and contributory negligence shall be for the jury.

Contracts and Rules Subordinate. (6) No contract or receipt between any employe and a railroad company, no rule or regulation promulgated or adopted by such company, and no contract, rule or regulation in regard to any notice to be given by such employe shall exempt such corporation from the full liability imposed by this section.

"Railroad Company" Defined. (7) The phrase "railroad company," as used in this section, shall be taken to embrace any company, association, corporation or person managing, maintaining, operating, or in possession of a railroad in whole or in part within this state whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver.

Conflict of Laws. (8) In any action brought in the courts of this state by a resident thereof, or the representative of a deceased resident, to recover

"SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability, created by this Act, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

"SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

"SEC. 7. That the term 'common carrier' as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"SEC. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or

damages in accordance with this section, where the employe of any railroad company owning or operating a railroad extending into or through this state and into or through any other state or states shall have received his injuries in any other state where such railroad is owned or operated, and the contract of employment shall have been made in this state, it shall not be competent for such railroad company to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

Shop or Office Employes. (9) The provisions of this section shall not apply to employes working in shops or offices." (Wis. Stat. 1911, pp. 1312-13.)

to impair the rights of their employes under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled 'An Act relating to Liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employes' approved June eleventh, nineteen hundred and six.

"SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury. [Act April 22, 1908 (35 Stat. L., 65, c. 149), as amended by Act April 5, 1910 (36 Stat. 291, c. 143).]

ADMISSION OF SERVICE.

Service of the foregoing brief is hereby accepted and delivery of three copies thereof is hereby acknowledged this 3d day of March, A. D. 1915.

Edward M. Stuart,

Solicitor and Counsel for Plaintiff in Error, Chicago and North Western Railway Company.